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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~122~~. ~~1500~~ ~~694~~ 285

AUT MILLER, PLAINTIFF IN ERROR,

vs.

ERNST AMMON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED OCTOBER 26, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1422.

AUT MILLER, PLAINTIFF IN ERROR,

vs.

ERNST AMMON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

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Judd & Detweiler, Printers, Washington, October 27, 1888.

1 Pleas in the circuit court of the United States for the southern district of Iowa, central division, at a term thereof begun and holden in the United States court-room, at the city of Des Moines, in said district, on the second Tuesday of May, it being the 8th day of May, A. D. 1888, the Honorable James M. Love and Oliver P. Shiras, judges of said court, presiding.

[Seal U. S. Circuit Court, Southern District Iowa.]

Attest: E. R. MASON, *Clerk.*

2 Be it remembered that heretofore, to wit, on the 5th day of September, A. D. 1887, Ernst Ammon, plaintiff, by Blum and Blum, his attorneys, filed in the clerk's office of the United States circuit court for the southern district of Iowa, central division, a petition against Aut Miller, defendant; which said petition is in the words and figures following, to wit:

3 In the Circuit Court of the United States, Southern District of Iowa, Central Division.

ERNST AMMON *vs.* AUT MILLER.

Ernst Ammon, plaintiff, by Blum & Blum, his attorneys, for cause of action against the defendant, Aut Miller, states—

That the plaintiff is now and has been for more than five years last past a citizen of Illinois, doing business at the city of Chicago, State aforesaid, under the firm name and style of E. Ammon, and that the defendant is a citizen of the State of Iowa, residing at the city of Des Moines, in said State.

That on March 16th, 1887, the defendant, who was then a citizen and resident of Wisconsin, at the city of Chicago, State of Illinois, purchased of the plaintiff twenty-five casks of sherry wine, containing 1,125 gallons, at $2.50 per gallon, amounting to $2,812.50,
4 and twenty-five casks of port wine, contain- 1,100 gallons port wine, at $2.25 per gallon, amounting to $2,475, making a total of $5,287.50, upon ninety days' credit, which said 1,125 gallons of sherry wine and 1,100 gallons of port wine were on said day last mentioned delivered by the plaintiff to the defendant, at said city of Chicago, at defendant's request, and were then and there received by the defendant, and for which the said defendant, at said city of Chicago, then and there agreed to pay the plaintiff, ninety days after said date, said sum of $5,287.50; yet, although said time for payment has long since passed, the defendant, although often requested, has not paid to the plaintiff said sum of $5,287.50 or any part thereof, but refuses so to do, to the damage of the plaintiff of $6,000.00; for which amount he prays for judgment against defendant, with interest and costs.

(Signed) BLUM & BLUM,
Attorneys for Plaintiff.

(Endorsed:) No. 3339. Law. U. S. circuit court, southern dist. Iowa, central division. October term, 1887. Ernest Ammon *vs.*

Aut Miller. Petition. Filed Sep. 5, 1887. Ed. R. Mason, clerk. Blum & Blum, attorneys-at-law, No. 95 Dearborn street, Chicago.

5 And on the 5th day of September, 1888, a præcipe for summons was filed by plaintiff in said cause in the words and figures following, to wit:

6 U.S. Circuit Court, Southern District of Iowa, Central Division. October Term, 1887.

ERNST AMMON, Plaintiff, *vs.* AUT. MILLER, Defendant.

Damages, $6,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of assumpsit to the damage of said plaintiff in the sum of six thousand dollars; direct the same to the marshal of said district to execute and make it returnable to the October term of said court, A. D. 1887.

(Signed) BLUM & BLUM,
Plaintiff's Attorneys.

Chicago, August 31, 1887.

(Endorsed:) No. 3339. Law. U. S. circuit court, southern dist. Iowa, central division. Ernst Ammon *vs.* Aut Miller. Præcipe. Filed Sep. 5, 1887. Ed. R. Mason, clerk. Blum & Blum, plaintiff's attorneys.

7 And on the 7th day of September, 1887, a summons was issued out of the clerk's office of said court in said cause, which said summons, together with the marshal's return of service endorsed thereon, was filed in said cause on the 10th day of September, 1887, in the words and figures following, to wit:

8 UNITED STATES OF AMERICA, *Southern District of Iowa:*

To the marshal of the southern district of Iowa:

In the name of the President of the United States you are hereby commanded to summon Aut. Miller, a citizen of the State of Iowa, to appear before the honorable circuit court of the United States in and for the southern district of Iowa, on the first day of the next term thereof, to be begun and holden at the city of Des Moines on the third Tuesday of October next, it being the 18th day of October, A. D. 1887, then and there to answer unto Ernst Ammon, a citizen of the State of Illinois, in a plea of assumpsit, to the damage of said plaintiff in the sum of six thousand dollars.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Des Moines, this the 7 day of September, A. D. 1887, and of the Independence of the United States the 112th.

[SEAL.] (S'g'd) EDWARD R. MASON,
Clerk U. S. Circuit Court, Southern District of Iowa.

9 This writ came into my hands for service on the 9th day of September, A. D. 1887, and I served the same on the within-named Aut. Miller on the 9th day of Sept., 1887, by reading the same to him and by delivering a true copy to him at Des Moines, in the county of Polk and State of Iowa.

(S'g'd) EDW. CAMPBELL, Jr.,
U. S. Marsh.,
By S. S. ETHRIDGE, *Deputy.*

Marshal's fees:

Mileage, — miles	$0 10
Service on —	2 00
Copy	50
	$2 60

Paid by pl'ff's att'y.

(Endorsed:) No. 3339. Law. Summons. Circuit court of the United States, district of Iowa. Ernst Ammon *vs.* Aut. Miller. Filed Sep. 10. 1887. Ed. R. Mason, clerk. Blum & Blum, attorney- for plaintiff. Residence, Chicago.

10 And on the 22d day of March, 1888, the defendant, Aut Miller, by Cole, McVey and Clark, his attorneys, filed in said cause his answer to plaintiff's petition; which said answer is in the words and figures following, to wit:

11 United States of America,
Southern District of Iowa, Central Division, } *ss:*

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

Ernest Ammon *vs.* Aut. Miller.

The defendant, for answer to the petition in the above-entitled cause, states that on or prior to March 16th, 1887, and ever since said date there has been in force in the State of Illinois a statute duly enacted by the General Assembly of said State, which statute is in words as follows:

"The city council in cities and president and board of trustees in villages shall have the following powers: * * *
To license, regulate, and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license;"
which said statute is chapter 24 of the Revised Statutes of
12 Illinois of 1882, and to which said statute defendant hereby refers and makes a part of this answer.

That ever since the 1st day of January, 1885, and long prior thereto the city of Chicago has been a duly incorporated city under the laws of the State of Illinois, and has been during all of said time and is still situated within the county of Cook, in the State of Illinois.

That on July 1st, 1885, there was in force and full effect and operation in said city of Chicago, the following ordinance:

"An ordinance concerning the licensing of wholesale liquor dealers.

SEC. 1. No person, firm, or corporation shall sell or offer for sale any spiritous or vinous liquors in quantities of one gallon or more at a time, within the city of Chicago, without having first obtained a license therefor from the city of Chicago, under a penalty of not less than $50.00 or more than $200.00 for each offense. But no distiller who has taken out a license as such, and who sells only distilled spirits of his own production at the place of manufacture, shall be required to pay the license herein prescribed on account of said sale.

SEC. 2. All such licenses shall be issued in accordance with
13 the general ordinances of the city governing licenses, and for
every such license there shall be charged at the rate of $250.00
per annum."

To which said ordinance defendant refers, and makes the same a part of this his answer.

That the foregoing ordinance has since July 1st, 1885, continued and still continues in full force, effect, and operation in said city of Chicago, and was in full force, operation, and effect in said city of Chicago on the 16th day of March, 1887.

That the general ordinances of the city of Chicago referred to in said section 2, governing licenses, are as follows: "Chapt. 1, sec. 499. The mayor shall grant licenses, for the purposes authorized by these ordinances, to such residents of the city (Chicago) of the age of 21 years, duly qualified according to the ordinances of the city council, as he may deem proper, unless the city council shall otherwise designate, and may revoke the same at pleasure."

"Art. 26. Licenses.—SEC. 1566. Each and every license authorized and required by this ordinance and granted by the mayor shall be
issued by the city clerk on notice to him from the city col-
14 lector that the license fee or tax has been paid, and not other-
wise."

"SEC. 1569. No license shall be granted for a longer period than one year, and every license, except saloon licenses, shall expire on the last day of April next following. Every license shall be signed by the mayor and countersigned by the clerk, under the corporate seal."

To all of which ordinances herein set forth defendant refers and makes the same a part of this his answer.

That all the foregoing ordinances were in full force, effect, and operation in said city of Chicago on the 1st day of July, 1885, and have so continued ever since, and were in full force, operation, and effect in said city on the 16th day of March, 1887; and the defendant avers that at the time mentioned in the petition and ever since the year 1872 the said statute herein mentioned was the law of the State of Illinois, in full force and wholly unrepealed, and that all of the ordinances herein set forth have, ever since July 1st, 1885, been the law of the said city of Chicago, in full force and wholly unrepealed.

Defendant further states that on said 16th day of March, 1887,
the said plaintiff was a wholesale liquor dealer in said city
15 of Chicago, and was at that time carrying on in said city a
wholesale liquor business, within the meaning of the ordinance first above set out; that said plaintiff was not then a distiller, and never had a distiller's license from said city of Chicago, and he has no such license now.

That on said 16th day of March, 1887, said plaintiff had no license from said city of Chicago as a wholesale liquor dealer, and defendant avers that said plaintiff has not had any such license at any time in the years 1886 and 1887 and up to the present day; that all of the wine mentioned in the petition was, on said 16th day of March, 1887, vinous and intoxicating liquor, within the meaning of the said ordinance entitled "An ordinance concerning the licensing of wholesale liquor dealers," hereinbefore set out, and within the meaning of the statute of Illinois, hereinbefore set out, conferring on the city council in cities the power to license, regulate, and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed
or fermented liquor; that said sale of wines in the declara-
16 tion mentioned was made in violation of said laws and ordi-
nances, which fact the plaintiff then and there well knew.

Wherefore the defendant says that the plaintiff had no right or authority to sell the wines or any of them in the petition mentioned at the time therein stated or at any time, and the defendant therefore prays judgment for costs against the plaintiff.

(Signed) COLE, McVEY & CLARK,
Attorneys for Defendant.

(Endorsed:) United States circuit court. Ernest Ammon *vs.* Aut. Miller. Answer. Filed Mar. 22, 1888. Ed. R. Mason, clerk. Cole, McVey & Clark, def't's att'ys.

17 And on the 28th day of April, 1888, the plaintiffs, by his
attorneys, filed in said cause a demurrer to the answer of defendant herein; which said demurrer is in the words and figures following, to wit:

18 *Demurrer.*

UNITED STATES OF AMERICA: } *ss:*
Southern District of Iowa, Central Division, }

In the Circuit Court of the United States, Southern District of Iowa,
Central Division, to the October Term, 1887.

ERNST AMMON *vs.* AUT. MILLER.

Now comes the plaintiff, by Blum & Blum, his attorneys, and demurs to the answer of the defendant herein, and shows to the court the following grounds therefor:

1st. That said ordinance entitled "An ordinance concerning the licensing of wholesale liquor dealers," and both of said sections thereof set out in said answer, are unconstitutional and void.

2. That said ordinance and both sections thereof set out in said answer are void, in that they were enacted without authority of law.

3. That the matters contained in said answer are not sufficient in law to bar the plaintiff from having his aforesaid action, and he is not bound to answer the same.

19 Wherefore, for want of a sufficient answer in this behalf, the plaintiff demands judgment against the defendant, as prayed for by the petition herein.

BLUM & BLUM,
Attorneys for Plaintiff.

(Endorsed:) 3339. U. S. circuit court, southern dist. of Iowa, central division. Ammon *vs.* Miller. Demurrer to answer. Filed Apr. 28, 1888. Ed. R. Mason, clerk. Blum & Blum, attorneys-at-law, 95 Dearborn street, room 25, Chicago.

20 And on the 28th day of April, 1888, the defendant, by his attorneys, filed in said cause a trial notice in the words and figures following, to wit:

21 *Trial Notice.*

In the U. S. Circuit Court of Iowa in and for Cent. Div., Sou. Dist.
May Term, 1888.

ERNEST AMMON, Plaintiff,
vs. No. —.
AUT. MILLER, Defendant.

To the above-named plaintiff and to the clerk of said court:

You are hereby notified that the above-entitled cause will be for trial at the May term of said court, which begins on the 8th day of May, 1888.

(Signed) COLE, McVEY & CLARK,
Attorneys for Def't.

(Endorsed:) Trial notice. Ernest Ammon *vs.* Aut. Miller. (Not filed in time.) Filed Apr. 28, 1888. Ed. R. Mason, clerk. Cole, McVey & Clark, att'ys for def't.

22 And on the 12th day of May, 1888, in the record of the proceedings of said court is an entry in said cause in the words and figures following, to wit:

23 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1888.

ERNST AMMON
vs.
AUT. MILLER.
} No. 3339. Law.

SATURDAY, *May* 12, 1888.

This cause came on this day for hearing. Plaintiff appears by Blum and Blum, attorneys, and defendant by Cole, McVey and Clark, attorneys, and after argument of counsel thereon the demurrer filed by plaintiff to the answer of defendant herein was submitted to the court and taken under advisement.

24 And on the 2nd day of June, 1888, in the record of the proceedings of said court is the entry of judgment in said cause in the words and figures following, to wit:

25 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1888.

ERNST AMMON
vs.
AUT MILLER.
} No. 3339. Law.

SATURDAY, *June* 2, 1888.

This cause came on this day for hearing upon the demurrer filed by plaintiff to answer of defendant heretofore submitted to the court. Plaintiff appeared by Blum and Blum, his attorneys, and defendant by Cole, McVey and Clark, his attorneys; and the court having considered the same and being now fully advised in the premises, it is ordered that said demurrer be, and the same is hereby, sustained.

And the said defendant, electing to stand on his said answer and refusing to further plead, it is ordered that judgment be entered in favor of plaintiff for the amount claimed in the petition, viz., the sum of five thousand two hundred eighty-seven & $\frac{50}{100}$ dollars, with interest thereon from June 16, 1887, at six per cent. per annum.

26 It is therefore considered, ordered, and adjudged that plaintiff, Ernst Ammon, do have and recover of and from defendant, Aut Miller, the sum of five thousand five hundred ninety-two and $\frac{47}{100}$ dollars, with interest thereon from this date at the rate of six per cent. per annum, together with the costs herein, taxed at $—, and that execution issue therefor.

27 And on the 2nd day of June, 1888, in the record of the proceedings of said court is an entry in said cause in the words and figures following, to wit:

28 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1888.

ERNST AMMON
vs. No. 3339. Law.
AUT MILLER.

SATURDAY, *June* 2, 1888.

This cause came on this day for hearing upon the motion of defendant for the allowance of a writ of error to the Supreme Court of the United States upon the judgment this day entered herein against said defendant.

And the court being now fully advised in the premises, it is ordered that said motion be sustained and a writ of error allowed herein, and that the writ of error bond to act as a supersedeas of the said judgment be fixed at the sum of seven thousand dollars, to be approved by one of the judges of this court.

29 And on the 2nd day of August, 1888, a stipulation as to filing bond on writ of error was filed in said cause in the words and figures following, to wit:

30 *Stipulation.*

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

ERNST AMMON *vs.* AUT. MILLER.

It is hereby stipulated that the time for filing the bond to be filed by the defendant in this case pursuant to the conditions of his writ of error be extended thirty days from August 1st, 1888, and that any bond filed within such thirty days shall have the same force and effect as though filed before August 1st, 1888.

Des Moines, Iowa, July 20th, 1888.

(Signed) BLUM & BLUM,
Attorneys for Plaintiff.
(Signed) C. C. COLE,
Attorneys for Defendant.

(Endorsed:) Ernst Ammon *vs.* Aut. Miller. Stip. extending time to file bond. Filed Aug. 2, 1888. Ed. R. Mason, clerk.

31 And on the 24th day of September, 1888, a stipulation as to submission in Supreme Court of the United States was filed in said cause in the words and figures following, to wit:

32 *Stipulation.*

In the Supreme Court of the United States. October Term, 1888.

AUT. MILLER, Plaintiff in Error,
vs.
ERNST AMMON, Defendant in Error.

It is hereby stipulated between the parties to the above-entitled cause that said cause be submitted to the Supreme Court of the United States at the October term, 1888, pursuant to rule 20 of said Court.

(Signed) COLE, McVEY & CLARK,
Attorneys for Plaintiff in Error.
(Signed) LOUIS J. BLUM AND EDGAR C. BLUM,
Attorneys for Defendant in Error.

(Endorsed :) Supreme Court of the United States. Ammon *vs.* Miller. Stipulation as to submission in U. S. Supreme Court. Filed Sep. 24, 1888. Ed. R. Mason, clerk.

33 And on the 24th day of September, 1888, a bond on writ of error was filed in said cause; which said bond is in the words and figures following, to wit:

34 Know all men by these presents that we, Aut. Miller, John F. Bowman, and George A. Bowman, are held and firmly bound unto Ernst Ammon in the full and just sum of five hundred dollars, to be paid to the said Ernst Ammon, his heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of August, 1888.

Whereas, on June 2nd, 1888, at a term of the circuit court of the United States, in a suit depending in said court between Ernst Ammon and Aut. Miller, a judgment for five thousand five hundred and ninety-two dollars and forty-seven cents and costs of suit was rendered against the said Aut. Miller, and the said Aut. Miller having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ernst Ammon, citing and admonishing him to be and appear at a Supreme Court of the United 35 States to be holden at Washington the second Monday of October next:

Now, the conditions of the above obligation are such that if the said Aut. Miller, defendant in said suit, shall prosecute said writ of error to effect and answer all costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and effect.

Witness our hands and seals the day and year above written.

(Signed) AUT. MILLER. [SEAL.]
(Signed) JOHN F. BOWMAN. [SEAL.]
(Signed) GEORGE A. BOWMAN. [SEAL.]

STATE OF IOWA,
Marshall County, } *ss:*

John F. Bowman, being first duly sworn, doth depose and say that he is worth the sum of $1,000 over and above his liabilities.

(Signed) JOHN F. BOWMAN.

Subscribed and sworn to before me this 7th day of August, A. D. 1888.

(Signed) [SEAL.] E. C. COOK,
Notary Public, Marshall Co., Iowa.

36 STATE OF IOWA, *Marshall County*, } *ss:*

George A. Bowman, being first duly sworn, doth depose and say that he is worth the sum of $1,000 over and above his liabilities, and that he owns the following real estate, of the value of $2,500, upon which there is an incumbrance of $ none, to wit: Lot 12, block 2, Anson's second addition, in the town of Marshall, Marshall county, Iowa.

(Signed) GEORGE A. BOWMAN.

Subscribed and sworn to before me this 7th day of August, A. D. 1888.

[SEAL.] (Signed) E. C. COOK,
Notary Public, Marshall Co., Iowa.

The foregoing bond is hereby approved.
August 17, 1888.
(Signed) J. M. LOVE, *Judge.*

(Endorsed:) O. K. Blum & Blum. Ernst. Ammon *vs.* Aut Miller. Writ of error bond. Filed Sep. 24, 1888. Ed. R. Mason, clerk.

37 And on the 24th day of September, A. D. 1888, an original writ of error was filed in said cause, the original of which is hereto attached and herewith returned.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the southern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Ernst Ammon, plaintiff, and Aut Miller, defendant, a manifest error hath happened, to the great damage of the said defendant, Aut Miller, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, sen. associate justice of the Supreme Court of the United States, the 13th day of August, A. D. 1888.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk U. S. C. C., S. Dist. of Iowa.

Allowed.
J. M. LOVE, *Judge.*

[Endorsed:] Ernst Ammon *vs.* Aut Miller. Writ of error. Filed Sep. 24, 1888. Ed. R. Mason, clerk.

39 And on the 24th day of September, 1888, a citation was filed in said cause, the original of which, with acceptance of service thereon, is hereto attached and herewith returned.

40 *Citation.*

THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Iowa, }

ERNST AMMON, Plaintiff, *vs.* AUT MILLER, Defendant.

To Ernst Ammon, plaintiff and appellee, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Iowa, wherein Aut Miller is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 15th day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

J. M. LOVE, *Judge.*

We hereby accept service of the above citation on behalf of Ernst Ammon and hereby enter our appearance as his attorney in the Supreme Court of the United States in said cause.

Chicago, Aug. 20th, 1888.

LOUIS J. BLUM,
EDGAR C. BLUM,
Attorneys for Defendant in Error, Ernst Ammon.

40½ [Endorsed:] United States circuit court, southern district of Iowa, central division. Ammon *vs.* Miller. Citation. Filed Sep. 24, 1888. Ed. R. Mason, clerk.

41 United States Circuit Court, Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the pleadings, proceedings, and record entries in a certain cause adjudicated in said court, wherein Ernst Ammon was plaintiff and Aut Miller was defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original writ of error and the original citation, with acceptance of service thereon, are hereto attached and are herewith returned with this transcript.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, at the city of Des Moines, in the southern district of Iowa, this 9th day of October, 1888.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk U. S. Circuit Court, Southern District of Iowa.

Endorsed on cover: S. Iowa C. C. U. S. No. 1422. Aut Miller, plaintiff in error, *vs.* Ernst Ammon. Filed October 26, 1888.

Brief for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1888.

AUT MILLER, PLAINTIFF IN ERROR,

vs.

ERNST AMMON, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA.

C. C. COLE, Attorney for Plaintiff in Error,
Des Moines, Iowa.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1888.

AUT MILLER, PLAINTIFF IN ERROR,

vs.

ERNST AMMON, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF FACTS.

The defendant in error sets up in his petition in this cause, that on March 16, 1887, at the city of Chicago, his place of residence, the plaintiff in error, who was then a citizen of Wisconsin, and is now a citizen of Iowa, purchased of him some wines and liquors to the amount of $5,287.50, also that the goods were delivered at that place, and payment therefor was then and there promised, but that no payment has, either in whole or in part, been made.

The answer of the plaintiff in error sets forth that there is now in force in Illinois a statute empowering cities to regulate, license and prohibit the sale of intoxicating liquors; and that, under this power, the city of Chicago passed an ordinance prohibiting the sale of liquors by any one not duly licensed by the local authorities, under a fixed penalty. The ordinance then goes on to prescribe the course which an applicant for a license must pursue to obtain it, and the duty of the officer issuing it. The answer further sets up that the defendant in error, at the time he made the sale in question, did not have a license, nor has he ever had any, and that the sale was therefore illegal and can not be enforced.

The defendant in error filed a demurrer to this answer, in which he set up that the ordinance in question was enacted by the city of Chicago without authority of law, and was for that reason void. The court sustained the demurrer and rendered judgment in favor of plaintiff, (defendant in error,) for the full amount claimed by him. Thereupon plaintiff in error sued out a writ of error to reverse this judgment.

The statute of the State of Illinois, under which the ordinance was passed, is section 46 of chapter 24, Revised Statutes of Illinois, 1874, and is as follows:

> "The city council in cities and president and board of trustees in villages shall have the following power: * * * To license, regulate and prohibit the sale or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted and to determine the amount to be paid for such license."

The ordinances of the city of Chicago here called into question are as follows;

> "*An ordinance concerning the licensing of wholesale liquor dealers.*
>
> SEC. 1. No person, firm or corporation shall sell, or offer for sale, any spirituous or vinous liquors, in quantities of one gallon or more at one time, within the city of Chicago, without first having obtained a license therefor from the city of Chicago, under a penalty of not less than fifty nor more than two hundred dollars for each offense, but no distiller who has taken out a license as such, and who sells only distilled spirits of his own production at the place of manufacture, shall be required to pay the license herein prescribed on account of such sales.
>
> SEC. 2. All such license shall be issued in accordance with the general ordinances of the city concerning license, and for every such license there shall be charged at the rate of $250.00 per annum.

The general ordinances of the city of Chicago referred to in Section 2, governing license, are as follows:

"CHAP. 1. ART. 1. SEC. 499. The mayor shall grant licenses for the purpose authorized by this ordinance to such residents of the city, of the age of twenty-one years, duly qualified according to the ordinances of the city council, as he may deem proper, unless the city council shall otherwise designate, and may revoke the same at pleasure."

"SEC. 1566. Each and every license authorized and required by this ordinance, and granted by the mayor, shall be issued by the city clerk, on notice to him from the city collector, that the license fee or tax, has been paid, and not otherwise."

"SEC. 1569. No license shall be granted for a longer period than one year, and every license, except saloon license, shall expire on the last day of April next following. Every license shall be signed by the mayor and counter-signed by the clerk under the corporate seal."

ASSIGNMENT OF ERRORS.

1. The court erred in not holding that the defense set up in the answer of the defendant, (plaintiff in error here,) is a full and perfect defense to this action.

2. The court erred in not holding that said ordinance set up in the answer entitled "an ordinance concerning the licensing the wholesale liquor dealers" is valid and operative.

3. The court erred in not holding that the sale in question having been made in violation of said ordinance, and said ordinance being valid, the sale was illegal and unenforcable in a court of law.

4. The court erred in failing to hold that said statute of the state of Illinois vested in the city of Chicago full power and authority to enact the ordinance in question, to-wit: "An ordinance concerning the licensing of wholesale liquor dealers."

5. The court erred in sustaining the demurrer of plaintiff. (Defendant in error here.)

6. The court erred in rendering judgment against the defendant.

ARGUMENT.

There is no dispute in this case as to any question of fact, and the only issue involves purely a construction of the law upon two propositions. 1. Whether the ordinance relied upon by plaintiff in error is valid. 2. Whether, if the ordinance is valid, the fact that the sale was made in violation of the ordinance renders the sale illegal.

I.

As to the validity of the ordinance, we call the attention of the court to the fact that the question is one of purely local law. It involves the construction of local ordinance and a state statute, neither of which is claimed to be in conflict with any provision of the federal laws or constitution. It is a well settled rule of this court, that in construing such statutes, it will follow the construction of the highest court of the state upon its own laws. It is, therefore, manifest that the question as to the validity of the ordinance is no longer an open one, inasmuch as it has been directly passed upon by the supreme court of Illinois. The case to which we have reference is the case of Dennehy *vs.* The City of Chicago, reported in 120 Illinois, 627. In that case, in a lengthy and exhaustive opinion, that court sustained the validity of this ordinance in every particular. We submit that, under the rule of this court, that the decision is binding here.

As we understand, the claim made by the defendant in error that this ordinance is invalid is based upon this position—the legislature of Illinois, by the passage of the act in question, did not, it is claimed, intend to vest in cities the power to suppress the wholesale liquor traffic, and that the power conferred was intended by the legislature to extend only to the retail traffic. Secondly, that the power conferred was a mere police power, and was not intended for the use of the city as a means of raising revenue. These were the very points at issue in the Dennehy case, and positions stated were pronounced unsound and untenable. The ordinance being therefore valid and binding, the only question re-

maining is whether a contract made in violation of it is legal and can be enforced in the courts. We submit, as principles of law, settled beyond all controversy, that no right of action can arise from a contract prohibited by statute; that a promise in consideration of such an act is void; and a sale made without the license required by law is an illegal contract and cannot be enforced. It is not necessary for the statute to declare acts done in violation of it void. The mere forbiddance of an act, under a penalty, renders the act illegal. Legislatures sometimes prohibit the doing of an act under a penalty, and at other times merely impose a penalty for its commission without any word of prohibition. It is now settled law that either law is effectual as a prohibition. The distinction between *mals prohibita* and *malum in se* has been abolished.

These rules are subject to but one qualification. In general, an act prohibited by statute is illegal and cannot be enforced. But sometimes it is evident that the legislature never intended the statute to have such an effect, but intended that the penalty should be the sole punishment for a violation of the law. Often the statute itself declares which of these two intentions governs. More often, as in the case at bar, the statute is silent upon the subject. In such cases, the rule laid down by this court is that when the statute is silent and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.

Clearly, the contrary can not be inferred in this case. In fact if the presumption of law were otherwise, that presumption would be overcome in this case for various reasons. In the first place, the ordinance relates to the sale of intoxicating liquor, which is a matter of public policy. The State Statute, under which the ordinance was passed, confers upon the city the power to regulate, license and *prohibit.* The ordinance itself tends equally to the regulation and partial prohibition of the traffic. The ordinance was evidently enacted not merely to raise revenue, but to confine the right to sell liquor to such persons or classes as the city authorities might deem proper. The language of the ordinances admits of no other construction. The ordinance says that licenses shall be granted by the mayor only to persons of a certain age and who are proper persons and otherwise qualified. This is the policy of the law, made in the public interest. Any contract made in violation of this law is certainly opposed to public policy, and the courts will not lend their aid to its enforcement.

To illustrate: let us suppose that defendant in error is an immoral and improper person, and for that reason was refused a license by the mayor of Chicago. He would be disqualified from conducting that business. In spite of the law, however, he does engage in the business, and asks the court to enforce his contracts as perfectly legal and proper transactions. The law says that he shall not conduct his business without a license. He has determined to do so, however, and asks the court to uphold his defiance of the law. This may be more than a mere hypothesis. These are probably the real circumstances. At least the facts furnish a strong presumption that this is so. But whether this is so in this particular case or not, the construction contended for by the defendant in error would lead to the same result, viz: By its adoption the courts would thwart the policy of the law; for other parties who would not be qualified to receive a license, could sue upon similar contracts, and could recover if the defendant in error can recover in this case.

We say further that, while the plaintiff in error was, knowingly or unknowingly, a party to the illegal contract and would be precluded from enforcing it in any way or sueing for damages for its breach, yet he may plead it in defense; that it would be a good defense in the courts of the State of Illinois, and that whatever is a good defense in the state where a contract is made is a good defense everywhere.

II.

It is a settled rule of this court that state decisions as to the constitution and laws of this state are followed by this court.

Bucher vs. Cheshire R. Co., 125 U. S., 555.
Stryker vs. Goodenow, 123 Id., 527.
Moores vs. Bank, 14 Otto, 625.
Fairchild vs. Gallatine County, 100 U. S., 47.
Venice vs. Murdock, 92 U. S., 501.
Adams vs. Preston, 22 How., 473.
Walker vs. Harbor Com'rs, 17 Wal., 648.
Commercial Bank vs. Buckingham, 46 U. S., 317.
Nesmith vs. Sheldon, 7 How., 812.
Martlett vs. Silk, 11 Pet., 22.
Green vs. Neal, 6 Id., 291.
Jackson vs. Chew, 12 Wheat, 153.
Elmendorf vs. Taylor, 10 Id., 152.
Darby vs. Mayer, Id. 152.
Clerk vs. Graham, 6 Id., 574.
Polk vs. Wendal, 9 Cranch, 87

The plaintiff in error relies in this case upon an ordinance duly enacted by the city of Chicago under a grant of power from the state of Illinois. The validity of the statute is not called into question, but the ordinance is alleged by defendant in error to be void on the ground, as we understand, that the legislature of the state did not intend, by the grant of the power in question, to include the wholesale liquor traffic in its terms. Another objection to the validity of the ordinance made in the court below, and which will probably be made here is that the legislature intended to delegate only a police power, and did not intend to empower the city to make this right a source of revenue. A full, direct and conclusive answer to those objections is found in the fact that they have been thoroughly considered by the Supreme Court of Illinois and passed upon.

These objections were fully argued, and carefully considered by that court in the Dennehy case, and the validity of the ordinance was sustained in every respect. No appeal was ever taken from that decision, and if one had been, it would have been promptly dismissed by this court, inasmuch as there was no pretense made by any one that it involved the construction of any right claimed under the federal laws or constitution. The only questions presented or which could have been presented in that case or in the case at bar are purely local questions; and clearly, under the rule established by this court since its organization, the construction of the Illinois court is conclusive in this case.

The decision to which we refer was rendered by the Supreme Court of Illinois in a case apparently instituted to test the ordinance in question. In this case, the case of *Dennehy vs. The City*, 120 Ill., P. 627, the court, after quoting the statute conferring the power upon the city, says: "Looking at the language alone, it would seem to be as broad and comprehensive as could have been employed to convey the idea of an unlimited and unrestricted power to license, regulate and prohibit, except as affected by the provisos—for the use of only general language, plainly, to every apprehension, negatives the idea of restriction or limitation." At page 636, the court again say: "Counsel say: 'There could be no such legislation, and no occasion for it, but for dram-selling. * * * The dram shop is the institution, and the only one, calling for regulation or prohibition under either statute, and against it, exclusively, both alike are leveled."' The vice of this assumption runs through the entire argument of the counsel, on the effect of the inclusion of the word "prohibit." It is, that the quantity of liquor sold at one time, and the place at which it is drank—one or both—are the only inducing causes through which citizens of a community are injuriously affected by sales of liquors therein. Police regulations prohibiting sales of liquors are sustained, upon the ground that they are established for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances. Cooley's Const. Lim., (1st. Ed.,) 583, and authorities cited. It is manifest that selling drams over the counter, and liquors in greater quantities to be drank in or upon any adjacent premises, are but ways of selling liquors to be used as a beverage. But these are by no means the only ways, although they may be the worst, by which sales for that purpose can be made. Liquors may be purchased in quantities of one gallon or more and carried off to be drank at the home of the purchaser, or elsewhere other than at the place of sale or on the premises adjacent thereto, and when thus drank, they will, of course, produce the same drunkenness, and the same usual train of personal ills resulting therefrom. The injury to the citizen is as evident in the one case as it is in the other. It is of the same kind in each case, and if there be difference at all, it is obviously only in degree, not in quality; and whence, if the use of liquors as a beverage is injurious to the person to the degree justifying the prohibition of its sale for that purpose, it is clear the question of the quantity sold at any one time for that purpose is immaterial."

Without quoting any more at length from the opinion in the Dennehy case, it is sufficient to say that all the objections which were or could have been raised to the ordinance were fully met and overruled by the court.

We can perceive no reason why, under the rule laid down by Your Honors, this decision is not binding here. If there were a conflict of decisions rendered by the Illinois court, that would make a difference. But there is no conflict of this decision with any other opinion to be found in the Illinois reports. Indeed, there can be none, because this is the first case involving the construction of the statute of 1874, (the Act under consideration) which came before that court, and this is the only construction which that Act ever received. The former decisions of the court upon prior laws do not aid the defendant in error. On the contrary, so far as they go, they are authorities against him; and if they were not based upon the existence of special powers vested in the municipalities whose laws were under consideraton, they would be cited by us as conclusive here. The Illinois reports, however, contain scores of cases which involved the construction of liquor laws, and these decisions have invariably sustained the laws. It may be said that those cases related, for the most part, to sales in very small quantities, and that may be true, but it is not the ground upon which the cases were decided as they were. There is nothing in the opinion to indicate that if the laws had included the wholesale liquor traffic, the decision would have been any different.

All these laws and decisions have one aim and one purpose. They are framed with the intention and for the purpose to exercise a strict control over the liquor traffic, which is always a dangerous enemy to mankind. The legislative powers ought not to be thwarted by the courts in their laudable attempts to control this dangerous business, nor are they, for the courts invariably sustain such legislation.

The judgment of the Circuit Court in the case at bar is opposed, it appears to us, to the policy to which the Supreme Court of the United States has constantly adhered. This policy is to let the State Courts construe their own laws, to adopt them as thus construed, and thereby avoid the conflict of authority which would otherwise result from our complex system of government.

III.

Assuming then, as we believe we are warranted in doing, that the ordinance is valid and operative, we proceed to discuss the question whether a sale made in violation of it is a contract which will be enforced by the courts. This can scarcely be regarded at the present day as an open question. It has been before nearly all the high courts of the Union, both federal and state, and the law seems now to be definitely settled. We will call the attention of the court to some of the decisions.

Where the plaintiff can not establish his cause of action without relying on an illegal contract, he cannot recover.

Gunter vs. Leckey, 30 Ala., 591.

No cause of action can arise from an undertaking prohibited by statute.

Peck vs. Burr, 10 N. Y., 294.
Hathway vs. Moran, 44 Me., 6.
Lord vs. Chadbourne, 42 Id., 429.

A contract made in violation of a statute is void.

Robinson vs. Barrows, 48, Me., 186.
Dean vs. McLenden, 30 Miss., 343.

The want of a license, when one is required, renders a business illegal.

Rays vs. Johnson, 7 Gray, 162.

A sale without a license, when one is required by law, is an illegal contract and will not be enforced.

Bach vs. Smith, 2 Wash. (Va.) 145.
Cooley on Tax., P. 572, (2nd. Ed.)
Pangborn vs. West Lake, 36 Ia., 546.
Tegler vs. Shipman, 33 Id., 194.
Dillen vs. Allen, 46 Id. 299.
Caldwell vs. Bridall, 48 Id., 15.
Downing vs. Kinger, 7 Mo., 585.
Mason vs. Pitt, 21 Id., 391.
Bankcroft vs. Dumas, 21 Vt., 456.
Alexander vs. O'Donnell, 12 Kas., 608.
Anding vs. Levy, 57 Miss., 51.
Decell vs. Lewenthal, Id., 331.
Kennedy vs. Cochrane, 65 Me., 594.
Wait on Actions and Defenses, V. 7, pp. 64-65.
Id. V. 3, p. 591.

It is not necessary, to render a contract made in violation of a statute illegal, that the statute shall declare in terms that contracts made in violation of it shall be illegal. It is sufficient if the law forbids an act under a penalty, to render the act illegal. The old distinction between *mala prohibita* and *malum in se* is no longer recognized and does not affect the question.

Pollock's Principle of Contracts, pp. 260-261 and authorities there cited.

Bensley vs. Bignold, 5. B. and Ald., 335.
Bankcroft vs. Dumas, 21 Vt., 461.
Dillon on Mun. Cor. note to Sec. 245.
Best vs. Bender, 29 How. Pr. 439.

But this distinction, even if still existing, could not affect this case. No question as to whether or not the ordinance implies a prohibition can arise, because there is an express prohibition there. The ordinance does not say "if any person shall sell" he shall pay the penalty prescribed, but the language of the ordinance is "no person shall sell" without a license.

These rules have been modified in but one respect. It has been decided by this court that, whatever the language of the statute may be, the effect upon contracts depends upon the intention of the legislature, which must be gathered from the whole act; but that the presumption of law is always in favor of the prohibition, and this presumption will stand unless clearly overcome. The court, after stating the general principles announced in the authorities, lays down this doctrine: "The statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it is not to be so. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

Howard vs. Runnels, 12 How., 79.

Under this rule, the ordinance in question being silent upon the subject, the contract relied on by the defendant in error in this case is void and cannot be enforced unless the ordinance contains something from which the contrary can be inferred. If something of that kind in fact exists, we are unable to perceive it. Under the rule laid down, the burden is upon the party who contends that the contract is valid notwithstanding the ordinance to show that there is something in the ordinance sustaining that claim; the presumption of law is against it. But if the presumption were otherwise, we think it would be fairly overcome in this case. In other words, if the burden could be shifted in this case and the law would presume that contracts made in violation of the ordinance were intended to be valid unless the contrary appeared, we think that presumption would be effectually overcome in this case.

Firstly, the ordinance relates—not to a subject harmless in itself and which cannot rest upon public policy—but to intoxicating liquor; and it is well known that the regulation of this business is now one of the most important matters of public policy with which the legislature deals. The ordinance is evidently intended to restrict the sale of liquor; to effect a partial prohibition of it. The statute under which it is passed gives power to regulate, license and prohibit the sale of liquor. The ordinance does prohibit it to a certain extent. It provides that no person shall sell without a license, and then it goes on to state the only terms and conditions upon which a license can be procured. These terms include not merely the payment of a certain sum of money, but the possession of a good character and other qualifications. In the absence of these it is made the duty of the mayor to withhold a license. Now what was the purpose of these ordinances? Merely to raise revenue? Clearly not. Because a person who cannot satisfy the mayor that he is a proper person cannot under the law receive a license for any amount of money. It is a clear and definite policy, based upon the public welfare. This policy manifestly is, to confine the traffic in liquor to proper persons, and thus render it less objectionable and dangerous to the public interests. In the Dennehy case, the Supreme Court of Illinois, in sustaining the ordinance, bases its opinion on that very ground that it was passed in the interest of morality and for the public welfare.

It is not difficult to see the distinction between such a case as the present one and one, for instance, where the legislature provides that a sale of lots without first recording a plat shall subject the offender to a certain penalty. All that the legislature has in view by the passage of such a law is to insure the recording of the plat. Any one may record the plat and any one may make the sale. But the present business is not open to every one who may comply with a mere formality. Why not? Because the ordinance says, not merely that whoever makes a sale of liquor without a license shall pay a penalty, but that no person shall sell without a license and that no one but a proper person shall be able to procure a license.

Suppose this case, that the defendant in error, before making the sale in question, applied to the mayor of Chicago for a license and was refused, because he was unable to convince the mayor that he was a proper person to receive it. Under such circumstances, it is clear, he would be unable to engage in the liquor business on any terms, and could not make a contract which he would be authorized to execute. If the court holds such a contract to be valid, then we find that, notwithstanding the laws which forbid an improper person from engaging in the liquor business that class of personages can still engage in it and have their contracts enforced by the courts. According to this construction, the ordinance provides in effect that proper persons may sell liquor by paying two hundred and fifty dollars for a license, and improper persons may sell liquor without a license by paying a certain penalty whenever an offense can be proven against them. If they conduct their business with sufficient secrecy and no offense is provable, then they are enabled to conduct their business without any expense so far as the city is concerned, and it thus becomes a decided advantage to be an improper person, such an one being exempt from the tax which proper persons must bear.

This is not a mere supposition. It is a fair inference from the premises that defendant in error was unable to obtain a license, because unable to convince the city authorities that he was a proper person to receive it. If that is not so, why has he no license? Would he to save the paltry sum required by the ordinance for a license, take the risk of making sales and relying for the recovery of his money on the in-validity of a license law which had never been passed upon by the courts?

The proper test in this case is, would the courts of Illinois enforce such a contract? For the rule is that courts will not enforce contracts which are not valid according to the state where made. Whatever is a good defense in the latter place is good everywhere.

Wait on Action and Defenses, Vol. 7, p. 65.
Kennedy vs. Cochrane, 65 Me., 594.

The question as to whether or not the courts of Illinois would enforce such a contract is easily answered. The decision of the supreme court of Illinois in the Dennehy case furnishes an answer. In that case, the court held that this ordinance was enacted as a police regulation and was based upon a sound policy. Does anyone suppose that the court would enforce a contract made in violation of such an ordinance and consequently in violation of public policy? Surely not. No one who has read the Dennehy case can for a moment believe that an action brought on such a contract can ever be enforced in the courts of Illinois.

Let us reverse the positions of the parties, and suppose that after defendant in error made the contract now in suit—both parties knowing at the time of the sale that the vendor had no license—he refused to comply with it, and was sued by plaintiff in error for damages for breach of contract; that he set up the defense that the sale was made without a license. Would the courts of Illinois punish him for refusing to perform a contract which their laws forbade? Would they not sustain his position if, when called upon to give the reason for his refusal to perform, he would say: "I cannot perform this contract because the law forbids it; and if I do, I shall render myself liable to a criminal prosecution for the recovery of a penalty." Would the courts say that the performance of such a contract was obligatory upon him? And if not binding upon him, it can not bind the other party, and can have no binding force whatever.

Upon the argument of this case in the Circuit Court, it was, as we understood, practically, even if not in so many words, conceded by counsel for the defendant in error that if the ordinance is valid the defense set up is good. Nevertheless, we have proceeded to discuss this question here, as we will scarcely have an opportunity to file a reply brief if counsel for the defendant in error now see fit to contest our position in this regard.

All that has been said about rules of construction relating to statutes applies equally to ordinances. An ordinance properly enacted, has all the force and effect of a law passed by the legislature.

Mason vs. Shawneetown, 77 Ill., 533.

We do not believe that the judgment of the circuit court will be sustained in this case. We can not believe that a party can violate the laws of his state, and rely upon the courts of other states, or federal courts sitting in other states, to disregard the law of the state in which the contract was made and the decision of its highest court upon the construction of that law. The ordinance has been held valid and given effect in the state of Illinois, and that decision ought to be binding upon all courts. No appeal could have been entertained by this court from the judgment rendered in the Dennehy case. That judgment is binding and final, and can not by any legal possibility be reversed by this court by any direct proceeding, and ought not to be the subject of review in a collateral proceeding.

Respectully submitted,
C. C. COLE,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 31 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1888.

NO. 1422.

AUT MILLER,
Plaintiff in Error,
vs.
ERNST AMMON,
Defendant in Error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

AUT MILLER,
Plaintiff in Error,
vs.
ERNST AMMON,
Defendant in Error.

This suit is based upon a sale of liquor made by defendant in error, at Chicago, Illinois, to plaintiff in error, upon ninety days' credit. The contract was faithfully performed by both parties until the time of payment arrived, when plaintiff in error's conscience, for the first time, began to trouble him.

It appears that the city of Chicago, under a grant of power claimed by it from the state of Illinois, had, prior to the time of the sale, passed an ordinance prohibiting the sale of liquor in quantities of one gallon or more at a time without a license, procured on the terms provided for by the ordinances. Defendant in error having no such license, the sale, it is alleged in the answer, was illegal. Upon making this discovery, plaintiff in error declined to proceed in the execution of the unlawful agreement; but defendant in error, not sharing his scruples, instituted suit and obtained a judgment.

The statute of Illinois, partly set out by plaintiff in error, but of the whole of which the court will take judicial notice, is as follows:

"The city council in cities * * shall have the following powers: Forty-sixth: To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license. *Provided*, that the city council in cities, or president and board of trustees in villages, may grant permits to druggists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, subject to forfeiture, and under such restrictions and regulations as may be provided by ordinances. *Provided further*, that in granting licenses such corporate authorities shall comply with whatever general laws of the state may be in force relative to the granting of licenses."

QUESTIONS INVOLVED.

The defendant in error contends:

I. A law, prohibiting an act under a penalty, does not necessarily affect contracts made in violation of it.

II. This contract having been made before the Supreme Court of Illinois had passed upon the validity of the ordinance in question, that decision is not binding in this case upon this court. Furthermore, the decision, thereafter rendered, is in conflict with the previous decisions of that court.

III. The ordinance concerning the licensing of wholesale liquor dealers was passed without authority of law, and is therefore void. For the statute under which the city claims power to pass this ordinance was never designed by the legislature to include sales of liquor at wholesale.

IV. The ordinance is void because the statute confers, at most, a mere police power, and does not authorize the city to make the power thus granted a source of revenue.

While it is true, as a general rule, that a contract made in violation of a statute is void, the rule is only a general, not an invariable, one. Whether or not this rule is applicable to a particular case depends entirely upon the object sought to be accomplished by the law. In this instance, the purpose of the city in enacting the ordinance is evidently the collection of revenue, as appears from the high fee demanded for a license. It was, perhaps, never contemplated by the city that this ordinance would affect the validity of contracts.

But whatever may have been the purpose, and whatever may in consequence be the effect of the ordinance, the position of defendant in error is that he was at liberty to disregard the ordinance; that, from all the facts and circumstances which usually lead to the formation of a belief, he was and is of the firm opinion that the ordinance was enacted by the city without authority of law, inasmuch as the statute under which the requisite authority is claimed by the city was not designed by the legislature to embrace sales of liquor at wholesale. This is by no means a strained inference, drawn to meet the exigencies of this case, but is a conclusion based upon established canons of statutory construction.

A question to be first considered is presented by the fact that, before this action was commenced, the Supreme Court of Illinois rendered a decision upholding the validity of this ordinance. While it is true that, where the local law of a state has been settled by a series of adjudications of the state court so as to have become a settled rule of property, the construction thus rendered will be followed by the federal courts, that rule can find no application in this case. The contract in suit was entered into before the rendition of the decision in the Dennehy case—the only case ever decided in Illinois upon that question; and, under the rule laid down repeatedly by this court, the federal courts will not, under such circumstances, consider a decision by the state court binding. The defendant in error, dealing with a citizen of another state, before the decision of the state court was rendered, had a right to presume that, if any litigation would arise in the matter, his rights would, according to the constitution and laws of the United States, be determined by the federal court. He was under no duty to anticipate the decision of the state court; and, had he been, he would probably have anticipated wrongly. This statement will be rendered more comprehensible by a consideration of the next question.

From its organization as a state, Illinois has always manifested a liberal policy in relation to the wholesale liquor traffic, while placing strong restrictions upon the retail business. This policy has been clearly proclaimed by the Supreme Court of

Illinois in language hereafter quoted. There is nothing in any state law indicating a change of policy. On the contrary, the general legislation of the state shows affirmatively an intention to adhere to that policy and an undesire to restrain the wholesale liquor traffic. This particular statute, under which the city claims its power, must be construed with reference to this policy and general legislation. The technical definitions of isolated words can throw but little light upon the subject. The law, to be construed properly, must further be considered as in *pari materia* with other laws passed by the legislature upon the subject. A reference to these affords in this case a clear demonstration.

The language of the statute conferring the power upon cities, is, it is true, broad and comprehensive. They shall have power, it says, to regulate the sale of any intoxicating liquors. Yet it is evident that the legislature did not mean all intoxicating liquors, for, at the same time and in the same act, the legislature makes further provision with regard to municipal power over the liquor traffic. These new powers are granted in language and under circumstances which prove conclusively the construction of the legislature that, by the grant of power in general terms in clause 46, it by no means conferred power over the entire subject. After enacting by clause 46 that the municipalities shall have power to license, regulate and prohibit the sale of "any intoxicating liquor," it proceeded, by clauses 82 and 91 of the same act, to provide that they shall have power to regulate, license and tax breweries and distilleries, and to determine their location. It is clear that, by the passage of these later acts, the legislature evinced its understanding that the powers therein provided were not included in clause 46; as, if they were, the passage of the later clauses was unnecessary, and the legislature cannot be presumed to do an unnecessary act.

The court will observe the different policies that inspired these several acts. The powers granted in clause 46 are "to regulate, license and prohibit;" while the powers conferred in clause 91 over distillers and brewers are "to regulate, license and tax." Regarding distilleries and breweries, the power to prohibit is expressly withheld.

The further legislation of the state affords more light upon the subject. In chapter 43 of the revised statutes is found an entire chapter devoted to the regulation of dram shops. A dram shop is therein defined to be a place where liquors are sold in quantities of less than one gallon, and municipalities are directed to grant no licenses for dram shops at less than five hundred dollars. By another provision, any person not having a license to keep a dram shop is prohibited from selling liquor in less quantities than one gallon, "or in any quantity to be drank upon the premises." For a violation of this law an offender may be imprisoned. This law shows the evil against which the legislative policy was directed.

As already seen, clause 46 does not confer a power over all intoxicating liquor, and the question then arising is, does it extend to the wholesale business? Now, here are two illustrations: over one class of liquor business the legislature confers power to prohibit; over another, it expressly with-holds this power. In which class did it design to include wholesale liquor dealers?

It is scarcely reasonable to suppose that the legislature, while denying cities the power to prohibit the manufacture of liquor by brewers and distillers, and while exercising no such power itself, intended nevertheless to prohibit its sale after its manufacture. In the history of prohibitory legislation, no instance can be found where the manufacture of liquor was permitted, and its sale at wholesale prohibited. In this particular instance, if the municipalities have power to prohibit its sale in every form and quantity, then they virtually have power to prohibit its manufacture; for distillers cannot be expected to manufacture an article which they are denied the privilege to sell, and a prohibition against their customers operates as a prohibition against themselves. Thus indirectly the city seeks to accomplish what the legislature says it shall not do, namely, prohibit the manufacture of liquor. The Supreme Court of Illinois in the Dennehy case touched this question very briefly, and pointed out that distillers could sell to druggists, to whom permits to sell could still be granted by municipalities under the proviso in clause 46. But that does not to any extent meet the objection. Under the proviso, cities *may* grant permits to druggists, but they are under no obligation to do it, and notwithstanding the proviso, they have full power to suppress the liquor traffic, if clause 46 extends to sales at wholesale.

Construed together as they should be, we find that by the passage of clauses 46, 91 and the dram shop act, the legislature has given municipalities power to regulate and prohibit certain branches of the liquor traffic, has denied such power over other branches, and has pointed out specifically the class of business to which this power should be directed.

The contention of defendant in error that clause 46 does not include the wholesale liquor business presents no novel question. This was the contemporaneous construction given by the cities of Illinois; for, as is stated by plaintiff in error in his brief, (though for another purpose) no other case ever arose involving the question, and the only attempt to regulate that business ever made in the state, so far as the Illinois Reports show, was made about fifty years ago, by a municipality operating under special powers.

The same construction of clause 46 was given by the Supreme Court of Illinois itself. That court construed clause 46 to relate to the sale of intoxicating liquors by *the retail*. The contradiction created subsequently by the Dennehy case is not satisfactorily explained by the court, and furnishes another ground of jurisdiction for the federal courts, which will not, under established rules, regard state decisions, if conflicting, to be binding.

The next ground upon which defendant in error contests the validity of the ordinance is this: The statute grants power to regulate, license and prohibit. According to principles laid down by the courts of nearly every state, the power conferred by these terms is a mere police power, and does not afford a city a means of raising revenue; that there is a very clear distinction between the power to license and the power to tax, the former being exercised solely under the police power of the state, while the latter finds its origin in the state's power to raise revenue. The Supreme Court of Illinois, slightly modifying these principles, has laid down the rule that, under the powers to license and prohibit, or to regulate and prohibit, taxes may in effect be imposed to any extent. But the court does not hold that the power to raise revenue is necessarily included in these terms. Its doctrine is that the inclusion or exclusion of that power depends upon the intent of the legislature, to be gathered from the purpose and scope of the act without reference to the use of technical terms. As regards the statute now under consideration, it is evident that the legislature never designed to render clause 46 a source of revenue, but intended to provide for revenue from liquor interests in subsequent sections; and that is what it in fact did. In clause 91, power is given cities to tax distillers and brewers; and, by the dram shop act, the legislature provides the terms on which license shall be granted by cities to dram shop keepers.

Assuming it to be incumbent upon defendant in error to prove that the legislature did not, by the passage of clause 46, intend to confer a taxing power, there is abundant evidence to support this conclusion. The court will observe that clause 46 is one section of the law vesting in the municipalities of Illinois the powers which they can exercise and which are specifically enumerated. In every instance where similar powers are given, in the sections hereafter quoted, the powers conferred are to regulate, license, prohibit and *tax*, or to regulate, license and tax. Only in this one instance, clause 46, is the power to tax omitted. Either, then, this power was withheld, or its use in the other sections was superfluous. The former theory must be adopted, because under the law the legislature is never presumed to do a superfluous act.

From a consideration of the whole subject, it becomes apparent that the legislature of Illinois, in pursuance of a rational and reasonable public policy, vested in its municipalities power to license, regulate and prohibit the sale of liquors at retail, to restrict or prevent its general use as a beverage; that, to render the power of the cities more effectual, it gave them power to surveil and license the places at which liquor is manufactured; but that it was never contemplated to prevent the use of liquor as an article of commerce, sold in large quantities and subserving many worthy uses. Express mention is made by the legislature of all other branches of the liquor traffic; express powers are given over them. The wholesale liquor traffic alone escapes all mention. These are the facts; what is the conclusion?

ARGUMENT.

I.

A law, prohibiting an act under a penalty, does not necessarily affect contracts made in violation of it.

In the brief filed on behalf of the plaintiff in error in this case, it is stated that the defendant in error conceded the defense interposed herein to be good if the ordinance is valid. This is a slight misapprehension. The extent of the concession made was that, as a general principle of law, a contract made in violation of an ordinance is illegal; but this rule is subject to one modification, governing all cases. The intention of the framer of the act must determine its effect upon contracts. The law attaches penalties to many harmless acts and omissions, to enforce mere formalities, and without any reference to the validity of contracts. The learned counsel for plaintiff in error, while a justice of the Supreme Court of Iowa, laid down the true rule in this regard, and one which has met the views of this court:

"There is no doubt that the well settled general rule is that when a statute prohibits or attaches a penalty to the doing of an act, the act is void and will not be enforced, nor will the law assist one to recover money or property which he has expended in the unlawful execution of it; or, in other words, a penalty implies a prohibition though there are no prohibitory words in the statute, and the prohibition makes the contract illegal and void. * * * But, notwithstanding this general rule, it must be apparent to every legal mind that when a statute annexes a penalty for the doing of an act, it does not *always* imply such a prohibition as to render the act void. Suppose, for instance, the act itself expressly provided that the penalty annexed should not have the effect of rendering the act void. Surely in such case the court would not give such force to the legal implication, under the general rule above quoted, as to override the express negation of it in the statute itself. Then, upon this conclusion, we are prepared for the next step, which is equally plain, that if it is manifest from the language of the statute, or from its subject matter and the plain intent of it, that the act was not to be made void, but only to punish the person doing it with the penalty prescribed, it is equally clear that the courts would readily construe the statute in accordance with its language and its plain intent. We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil with which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment, and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." (Citing authorities).

Pangborn v. *Westlake*, 36 Ia. 548.

The question presented has at various times been considered by nearly all the courts, and the true rule, deduced from a consideration of all the cases, has finally been established by this court.

"It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption may be inferred from those rules of interpretation to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislators do not think the rule one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. For, in some statutes, it is said in terms that such contracts are void; in others, that they are not so. In one statute there is no prohibition expressed, and only a penalty; in another there is prohibition and penalty; in some of which, contracts in violation of them are void or not, according to the subject matter and object of the statute; and there are other statutes in which there are penalties and prohibition, in which contracts made in contravention of them will not be void, unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

Harris v. *Runnels*, 12 How. 81.
Armstrong v. *Toler*, 11 Wheat. 258.

From this excerpt, it will appear that the question as to the effect upon contracts made in violation of a law is at all times open to inquiry. In this particular case, plaintiff in error contends that, inasmuch as the subject of the ordinance is intoxicating liquor, and the object is to restrict and partially prohibit its sale, contracts made in violation of it are void. Standing alone, there would be great force in this argument; but at this point the inconsistency of his claims becomes apparent. The power conferred by the statute and employed by the ordinance either is a power to be wielded in furtherance of public policy, or it is not. If it is, then it is not a revenue power, and the city is not authorized to impose a fee of two hundred and fifty dollars for a license, but can charge merely the actual cost entailed by a regulation of the business. If, on the other hand, it is not, then contracts made in violation of it have no relation to any matter of public policy and are as valid as though the ordinance were, as it ought to be, out of existence. Both powers cannot be claimed under the language of the statute; for, as will hereafter be seen, that language is not broad enough to confer them.

Plaintiff in error has evaded the necessity of a choice between these two positions by assuming both. The ordinance, he argues, is the exercise of a mere police power, because it involves a question of public policy. Again, it is a mere revenue power, because the Supreme Court of Illinois has said so. This brings us, therefore, to a consideration of the question whether the fact that the Supreme Court of Illinois has expressed an opinion precludes further inquiry on the part of this court.

II.

This contract having been made before the Supreme Court passed upon the validity of the ordinance in question, that decision is not binding in this case upon this court.

The defendant in error maintains, upon clear and indisputable principles of law and construction—as they appear to him—that the ordinance in question is void, notwithsatnding the decision of the Supreme Court of Illinois to the contrary. 'It is true that this question involves the construction of a local ordinance and a local statute, the decisions upon which by the state courts are usually followed by this court, and which may, under certain circumstances, become binding upon this court. But it is also true that the defendant in error is a citizen of the United States, and as such is entitled to certain rights which the federal constitution secures to him. Among these is the right to have his causes against citizens of other states, in proper suits, determined by the federal courts, and to their independent judgment he is entitled, under all circumstances, admitting but one exception.

This exception is that when a state law has been settled by the state courts, by a series of unconflicting adjudications, so as to have become a rule ot property, the federal courts will follow that construction. This rule is but just and wreaks no hardship upon any one; for a party has no right to enter into contracts in disregard of the law as laid down by the Supreme Court of his state. But where a contract is entered into while no such rule of property exists, the federal courts consider the question presented upon its merits, notwithstanding any state decision rendered after the rights of the parties accrued. This case comes directly within that principle. The contract, as appears by the record, was made between the parties before the decision of the state court had been rendered. Not only was there at that time a total absence in Illinois of a series of adjudications establishing a rule of property in that regard, but there was not even a single decision for his guidance. No opinion of any lower court even can be found in the books, the proceedings in the lower courts in the Dennehy case itself having been mere formalities and not reported. Under these circumstances, he had the right to follow his own judgment and such counsel as he may have seen fit to obtain, and to rely upon his right, in the event of a refusal by customers in other states to perform their contracts for any reason, to seek a proper remedy in the federal courts. It can scarcely be assumed that he acted upon that reliance, for it is hardly possible that he anticipated any such trouble; but it was his right to do so, and his right can be no different whether known or unknown by him.

This question is not a new one in this court. It has been frequently passed upon, and has become settled law, in the course of federal procedure, that where, by reason of the citizenship of the parties, the federal courts acquire jurisdiction of a case, they will not be bound by the decision of the state court rendered after the rights of the parties vested, while according to the state decisions the high respect at all times due them.

In the case of *Burgess* v. *Seligman*, 107 U. S. 359, the Court construed a Missouri statute, which provided that, at the dissolution of a corporation, its stockholders should be liable for its debts, excepting, however, persons to whom stock might be pledged as collateral security. The only question before the Court applicable to the case at bar was whether persons to whom stock of a corporation had been pledged as collateral security by the corporation itself were within the exception of the statute. In the head notes, we find the following language:

"The Supreme Court of Missouri, after the transaction arose and after the Circuit Court had decided this case, made a contrary decision against the same stockholders at the suit of another plaintiff, holding that the clause of exemption in the statute does not extend to persons receiving stock as collateral security from the corporation itself; and this decision being urged as conclusive upon the federal courts, *held*, that this court is not bound to follow the decision of the state court in such a case. The federal courts have an independent jurisdiction in the administration of state laws in cases between citizens of different states, co-ordinate with and not subordinate to that of the state courts; and are bound to exercise their own judgment as to the meaning and effect of those laws. But since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the force of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, especially with regard to the law of real estate and the construction of state constitutions and statutes; such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence; and when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued." The court then, after stating that it would be a dereliction of their duty not to exercise an independent judgment, say: "As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehension which may arise from the language and expressions used in previous decisions."

Carroll County v. *Smith*, 111 U. S. 556, was a case brought on bonds issued by the county. The defense made was that the bonds had not been issued in conformity with the requirements of the state constitution, and a construction of that constitution became necessary. This court declined to follow the decision of the Supreme Court of Mississippi in the construction of its own constitution, and in its opinion lays down the following doctrine:

"The decision in *Hawkins* v. *Carroll Co.*, above referred to, is not a judgment of the Supreme Court of Mississippi, construing the constitution and laws of the state, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply to the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state, by which his rights are fixed and governed. It was to that very end that the constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal. *Burgess* v. *Seligman*, 107 U. S. 20, 33 (27, 359, 365). We have, however, considered the reasoning of the Supreme Court of Mississippi, in its opinion in the case of *Hawkins* v. *Carroll Co.*, with the respect which is due to the highest judicial tribunal of a state, speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fullness of its examination of the question, we are not able to adopt its conclusion."

Gibson v. *Lyon*, 115 U. S. 439, was a case involving a construction of the Pennsylvania ejectment laws. In that case the influence of state decisions upon local laws in the federal courts was considered, and the principle laid down as follows:

"It is urged by counsel for defendants in error, that the judgment of the Supreme Court of Pennsylvania in the ejectment suit in favor of the defendants against the immediate grantors of the present plaintiffs below, referred to in the eighth finding of fact, if not entitled to the force of an estoppel as *res judicata*, is at least an authoritative decision of the highest court of the state upon the law of the case, which, as it involves only questions of title to real estate within its territory dependent on its local jurisprudence, ought to furnish the obligatory rule of decision for the courts of the United States. * * * * As a precedent, the decision of the Supreme Court of the state, though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the state; but it cannot have conclusive force in the courts of the United States unless it has become a rule of property." (Citing Burgess and Carroll Co. cases). "The plaintiff in error, being a citizen of New Jersey, had a constitutional right, by virtue of that fact, to invoke the jurisdiction of the courts of the United States, and is entitled to their judgment upon his rights under the laws of Pennsylvania."

Anderson v. *Santa Anna Township*, 116 U. S. 356, was the next case in which this question was discussed; and the court, reciting at length the language quoted above from *Burgess* v. *Seligman*, reaffirmed the principle laid down in that case, and added: "While the courts of the United States accept and apply the construction of a state constitution or of a local statute, upon which the rights of parties depend, which has been fixed by the course of decision in the state court, it is the settled doctrine of this court, that rights accruing under one construction will not be lost merely by a change of opinion in the state court; and where such rights have accrued before the state court has announced its construction, the federal courts although leaning to an agreement with the state court, must determine the question upon their own independent judgment."

Pease v. *Peck*, 18 How. 595, was an early case, in which the court, declining to adopt the construction of the Supreme Court of Michigan on its own law, says: "There are, it is true, many *dicta* to be found in our decisions, averring that the courts of the United States are bound to follow the decision of the state courts on the construction of their own laws. But although this may be received as a correct, yet a rather strong, expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of states, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. * * When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a state. Parties who, by the constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court."

Morgan v. *Curtennius*, 20 How. 1.

Butz v. *Muscatine*, 8 Wall. 575, lays down the doctrine that a single decision of the state court is not, nor are even several decisions of the state court, sufficient to establish a settled line of authority which the federal courts will follow. The court says: "There are several adjudications of the highest court of the state more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part by blindly following the footsteps of others and substituting their judgment for our own. Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the constitution which called this court into existence. * * But it has been suggested in their behalf that we are concluded by the more limited interpretation of the provisions of the code which have been given to them by the Supreme Court of the state. To this we think there are several answers: 1. In all the cases brought here under the 25th section of the judiciary act this court has never hesitated to determine for itself the construction and effect of any statute of a state, brought under review, without reference to the previous adjudication of the highest court of the state upon the subject. * * Where the several decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases this court will, as it always has done, follow such adjudications. The cases of a different character, involving state statutes in which the adjudications of the courts of the states in relation to them have been departed from by this court, extend in an unbroken series from an early period after its organization to the present."

Venice v. *Murdock*, 2 Otto, 494.
Rowan v. *Runnels*, 46 U. S. 134.
Amis v. *Smith*, 16 Pet. 303.
Douglas v. *Pike Co.*, 101 U. S. 686.

Chicago v. *Robbins*, 2 Black, 419, was a case in which the court declined to follow the state court decision, only one having been rendered by the state court. The court says: "It was urged at the bar that this court, in such cases, follows the decision of the local courts. Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of a state court."

From the above citations, it appears that the construction of a local statute by a state court will be followed without further inquiry by the federal courts only when such construction has, by a series of consistent adjudications, become a settled rule of property. No such rule exists, as regards the present case. The case of *Dennehy* v. *The City of Chicago* was the first and last case in which the

Supreme Court of Illinois gave the construction rendered in that case to the statute and ordinance now under consideration, and there is no opinion as to any other law, bearing any similarity to this one, to be found in the Illinois Reports. No principle is laid down in any other case which could furnish proper guidance to parties interested or authority for this court. Under the principles here invoked, it appears that even now the decision in the Dennehy case, standing alone, has established no rule of property.

But this case is still stronger. As already stated, the contract between the parties hereto was entered into before the Illinois court had rendered its decision in the Dennehy case. To quote the language of the Court in the case of *Gibson* v. *Lyon*, *supra*, and substituting the names of other states, the position of defendant in error in the case at bar is thus laid down by the Court: "As a precedent, the decision of the Supreme Court of the state, though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the state; but it cannot have conclusive force in the courts of the United States, unless it has become a rule of property. The defendant in error, being a citizen of Illinois (and plaintiff in error a citizen of Iowa), had a constitutional right, by virtue of that fact, to invoke the jurisdiction of the courts of the United States, and is entitled to their judgment upon his rights under the laws of Illinois."

In the cases above cited, the parties who invoked the jurisdiction of the federal courts were non-residents in the state whose laws were under consideration, while in the case at bar, the party soliciting the aid of the federal courts is a citizen of the state whose law is in question; but this difference in fact creates no distinction in law. A party has the same right to sue in the federal courts as to be sued in them. He is no more bound to anticipate decisions delivered by the courts of his own state than those of other states. When the decisions of the state courts become rules of property, then first are they binding upon him, and then are they just as binding on citizens of other states. This rule has already been established by this court. In a case between citizens of the same state and appealed to this Court from the Supreme Court of Ohio, the Court laid down this rule in unmistakable terms. After referring to the case of *Rowen* v. *Runnels*, the court says: "And the court there said, that it would always feel bound to respect the decisions of the state courts, and from time to time as they were made, would regard them as conclusive in all cases upon the construction of their own constitution and laws; but that it ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this court were lawful at the time they were made. It is true, the language of the court is confined to contracts with citizens of other states, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction."

Ohio Ins. Co. v. *Debolt*, 16 How. 416.
Douglas v. *Pike Co.*, 101 U. S. 686.

This case does not present the question, urged by plaintiff in error in his brief, whether or not defendant in error is bound to obey the law as declared by the Supreme Court of his state; the question is whether he is bound to anticipate the decision of that court. This can scarcely be a duty devolving upon him; for the laws laid down by some of the state courts, though able and entitled to the highest respect, are not as fixed and immutable as the laws of nature, and at times excite no less astonishment than admiration.

But, had defendant in error, against probability, before entering into the contract in question, anticipated this suit and the questions involved, and had he then made all research accessible in the Illinois Reports, he would not have hesitated to make his contract; for the only reference made by the Supreme Court of Illinois in any case to the statute now under consideration supports his view. In that case, that court said, in words which can create but one certain inference and to which the law can give but one certain interpretation, that this statute was designed to apply only to sales of liquor by the retail. Reference to this case will be had hereafter in this brief, after the precise question involved and position assumed by defendant in error will have been more fully stated.

The position of the defendant in error here is strengthened also by the fact that it is supported by the opinion of one of the judges of the Supreme Court of Illinois, Mr. Justice Craig, who dissented from the majority opinion in the Dennehy case, on the ground that the statute was not intended to embrace the sale of liquor at wholesale. Here, then, we have not a rule of property, settled by a series of adjudications by the state court, but a single decision, rendered after the contract was entered into, and from which one of the judges dissents.

In view of the principles laid down by this Court, and their application to this case, the defendant in error deems himself at liberty to present to Their Honors his views upon the merits of the question, independent of the judgment of the state court.

III.

The ordinance concerning the licensing of wholesale liquor dealers is void, for the statute was never designed by the legislature to include the wholesale liquor traffic.

The statute under which the city of Chicago claims to exercise its authority to pass the ordinance in question confers upon cities power to license, regulate and prohibit the selling or giving away of any intoxicating liquors. By the enactment of this statute, did the legislature contemplate the inclusion of the wholesale liquor traffic? Viewing this clause as it stands, without relation to other laws and principles, the answer must be in the affirmative. The language used is broad and general, sufficiently so as to embrace liquor in any quantity, form or condition. But such a mode of construction cannot be adopted without a violation of the principles of construction demanded by reason and sanctioned by the authorities.

"Particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the state, and of the object of the legislature in the creation of the municipality."

1 Dillon on Mun. Cor., Sec. 87.

"The intention of the legislature may be found from the act itself, from other acts in *pari materia*, and sometimes from the cause or necessity of the statute; and wherever the intent can be discovered, it should be followed with reason and discretion, although such construction be contrary to the letter of the statute. * * A thing within the *intention* is within the statute, though not within the letter; and a thing within the letter is not within the statute, unless within the intention."

Potter's Dwaris, 144–188

People v. *Utica Ins. Co.*, 15 Johns. 380.

Jackson v. *Collins*, 3 Cow. 89.

"It is not the words of the law," says the ancient Plowden, "but the internal sense of it, that makes the law; the letter of the law is the body; the sense and reason of the law is the soul."

Id. 175.

Proceeding upon these principles, inquiry developes the fact that other statutes of the state in *pari materia* with this one, the general policy and legislation of the state upon the subject, and the object of the legislature in the creation of this power, all alike are opposed to the narrow construction suggested by the language of the act itself.

As to the policy of the state, the state of Illinois has never seen fit to enact a general prohibitory law. Recognizing the traffic in liquor to be one of those evils which can be most effectually checked by moderate legislation and restraint, the state has contented itself with regulations by its own acts, and through its municipalities, of the retail liquor business. In the history of the state legislation, no instance can be found of any attempt made by the legislature to impose any restriction, be it never so slight, upon the wholesale liquor traffic. This is not inexplicable; for, while retail places dispense liquor only as beverages—the only evil uses which it can subserve—the wholesale trade supplies it for employment in the many useful branches of industry and art, too generally known to require enumeration. This policy has been judicially declared by the Supreme Court of Illinois. "The policy of our legislature," says that court, "has always been to restrain the sale of spirituous liquor by retail."

Munsell v. *Temple*, 3 Gil. 96.

In the act of 1872, of which the statute under consideration, clause 46, forms a part, all powers conferred upon municipalities were clearly enumerated. If, then, the legislature had at that time designed to change its policy, it is but reasonable to suppose that it would have done so in express and unambiguous terms.

"The law rather infers that the act did *not* intend to make any alteration *other* than what is specified, and besides what has been plainly pronounced; for if the parliament had had that design, it is naturally said, they would have expressed it."

Potter's Dwaris, 185.

But whatever doubt might be created by the broad language contained in clause 46 is removed by an examination of the next element to which the law has recourse—the further legislation of the state upon the subject. Had the legislature, after enacting clause 46, left the subject of liquor, it would perhaps be a fair presumption that by that clause it designed to include all liquor in any form, quantity or occupation. This it did not do, however, but proceeded in the same act to provide other clauses, evidencing its intention and opinion that, by the passage of clause 46, it had not exhausted the subject.

Clause 82 of the same act confers power, "to direct the location and regulate the use and construction of breweries, distilleries," etc. Clause 91, * * * "to tax, license and regulate auctioneers, distillers, brewers," etc.

Evidently, the legislature did not intend to vest in cities the power to prohibit the entire liquor traffic, for, so far as breweries and distilleries are concerned, while other powers are granted over them, the power to prohibit is expressly withheld. The history of the prohibitory legislation of the world reveals no instance of a movement to suppress the sale and giving away of liquor while permitting its manufacture. If its manufacture is permitted, presumably it can exist for some lawful purpose. And, if it can exist for a lawful purpose, that purpose can only be attained by sale or gift. Is it conceivable that the state delegated to cities a power which the state itself never attempted to exercise, and the exercise of which would be absurd and impracticable?

The Supreme Court of Illinois, casually referring to this question in the Dennehy case, apparently failed to see its full import. The court attempted to meet this position by pointing out that, by virtue of the proviso in clause 46, sales can still be made by brewers and distillers to druggists and pharmacists who are empowered by the city to sell. But the answer does not meet the objection. Under the proviso, cities *may* grant permits to druggists and pharmacists. They are not bound to do so;

and, if they see fit to enact a general prohibitory law, they can do so by prohibiting the sale of liquor at wholesale and retail, and granting no permits to druggists and pharmacists. This, notwithstanding the policy and legislation of the state to the contrary. Under that construction, cities may prohibit the entire liquor traffic, notwithstanding the fact that over certain branches of it, breweries and distilleries, that power is expressly withheld. These can be prohibited indirectly, if not directly. It is true that the city of Chicago has not in this instance attempted to exercise this sweeping power, but the question is not whether it did, but whether it can; for it did license, and if it can license it can prohibit, the two powers being granted together.

Although clause 46 gives power to prohibit the sale of any intoxicating liquor, the use of the word "any" does not enlarge the grant. The other words employed would, in the absence of further explanation, be equally broad and comprehensive without the use of the word any. This word was evidently used for the purpose to include all kinds of liquor, questions having often arisen whether the more harmless beverages were included in prohibitory laws.

It being clear that clause 46 was not designed to embrace all liquors in all forms, the next question arising for determination is: What was it intended to include? The answer to this query is furnished by the further legislation of the state upon the subject; by another act, in *pari materia* with clause 46, and to which the legislature has reference when it commands cities, in clause 45, in regulating the sale of liquor, to comply with the general laws of the state upon the subject.

Sec. 16 of Chap. 43, Revised Statutes of Illinois, provides: "That hereafter it shall not be lawful for the corporate authorities of any city, town or village in this state to grant a license for the keeping of a dram shop, except upon the payment, in advance into the treasury of the city, town or village granting the license, such sum as may be determined by the respective authorities of such city, town or village, not less than at the rate of five hundred dollars per annum."

Sec. 1 of the same act is as follows: "1. Dram shop defined. That a dram shop is a place where spirituous or vinous or malt liquors are retailed by less quantities than one gallon."

Here is the evil recognized by the legislature and calling for remedial legislation. The dram shop is the institution to which its restrictions are directed. Cities are commanded to grant no license for a dram shop for less than five hundred dollars, and they are at liberty to charge any amount in excess of that sum, to the extent of prohibition. Manifestly, these stringent regulations against the dram shop, and the distinction created by the legislature between sales of less than a gallon and larger sales, prove that all sales were not regarded by it to be upon a moral level. It recognizes a clear difference, and points out in express terms the class to which the burdens provided by it should apply. In the opinion of the legislature, the evil existing is the use of liquor as a beverage, and its restriction for such use alone is its policy. It extends no further. This interpretation is rendered still more clear by the next section, Sec. 2 of the dram shop act.

"Sec. 2. Whoever, not having a license to keep a dram shop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity to be drank upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined not less than twenty dollars ($20) nor more than one hundred dollars ($100), or imprisoned in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court."

This law is clear enough. It means that a dram shop keeper who may sell liquor without a license shall not be permitted to plead in defense that the quantity sold was more than a gallon. The same is true as regards any other person. The law aims at a restriction of the sale of liquor as a beverage. The court will observe, however, that the language of the statute is not "or in any quantity," but "in any quantity to be drank *upon the premises.*" No objection is made by the legislature to sales in larger quantities than one gallon in the ordinary course of wholesale business, but the objection made is to the sale of liquor after dram shop methods. The statute contemplates not that the wholesale dealer shall be restrained in his legitimate business, but that he shall not, in the conduct of that business, engage in the calling of the dram shop keeper.

The Supreme Court of Illinois, in language quoted by plaintiff in error from the Dennehy case, rests its decision upon the statement that the evil of liquor lies in its use, irrespective of quantity, and that liquor sold in large quantities is just as injurious as if sold in small. The court might go one step further and say that sales at wholesale are more injurious than sales at retail, because a man who drinks a gallon of liquor is certainly more dangerous than one who drinks a quart; and, as the quantities decrease, the dangers diminish. But this reasoning ignores the fact that sales at retail can have but one purpose, and that the objectionable one in view, and that the same objection does not apply to sales at wholesale. It ignores the further fact that in nearly every city of the United States the retail sale of liquor is permitted, if at all, only under burdensome restrictions and regulations, while the sale at wholesale is permitted at will. The reason is obvious. Liquors are, at retail, a source of danger; at wholesale, an article of commerce. It is not a question of quantity, but of purpose; and the purpose is best evidenced by the quantity. The distinction, as seen above, is made and recognized by the legislature, whose opinion upon this question shows a marked difference from the view of the court. Which view is to govern? The construction of a law depends upon the intention of the legislature. Can the Supreme Court of the state ascribe to the legislature an intention denied and refuted by that body itself?

Again, the Supreme Court of Illinois, after pointing out in the Dennehy case that liquors consumed in large quantities may be injurious, concludes that, after all, morality and law know no distinction between retail and wholesale; that it is an arbitrary classification. It may be true that it is an arbitrary classification, as termed by the court;

but it is no less true that this arbitrary classification was made and established by the Illinois legislature; that that body proceeded to draw the line and to enact special laws relating to sales of liquor in quantities less than one gallon; and that the same classification is adopted by the city of Chicago. Both the state and the city recognize a wholesale liquor dealer to be one who sells in quantities larger than a gallon at a time. The state recognizes it in the dram shop act; the city employs it in the very ordinance now under consideration. "An ordinance concerning the licensing of wholesale liquor dealers," is the title of the ordinance; and then it goes on to provide for sales in quantities of one gallon or more at a time. Under the former law, it might have been difficult to determine in what the wholesale trade consisted, and it might perhaps have been extended to quantities of one barrel or more, to prevent its use as a beverage. But the present law leaves no room for doubt as to the meaning and extent of the terms "wholesale" and "retail," or as to the distinction made by the state and city between them. By leaving out of consideration the word "wholesale," and thus avoiding an "arbitrary classification," these liquor laws of Illinois may be said to embrace only sales in quantities of less than one gallon at a time, a definition as comprehensive as can be rendered by the use of the word "retail."

The distinction between the wholesale and the retail liquor business has been most distinctly recognized by the Supreme Court of Illinois itself. Under a power to suppress tippling-houses and dram shops, the town of Pontiac passed an ordinance prohibiting the sale of spirits or beer. The court, construing this ordinance, employs the language following: "Of the sections of the charter above quoted, the only one which professes to give the town power to legislate for the territory, * * is that which authorizes it to prohibit tippling-houses and dram shops * *. The power to prohibit a tippling-house or dram shop cannot be considered as embracing the power to prohibit the sale for exportation or for domestic use of a cask of beer. The appellant in the case before us was a brewer. It does not appear from the stipulation whether the four sales made by him were at wholesale or retail. Under the ordinance in question, a sale in any quantity or for any purpose, except by persons authorized to sell for medicinal, mechanical or manufacturing purposes, is forbidden. It would be a perversion of terms to hold that the power to pass this ordinance can be derived from a grant of power to prohibit tippling-houses and dram shops." The ordinance was thereupon declared invalid.

Strauss v. *The Town of Pontiac*, 40 Ill. 302.

This case, and the case of *Wright* v. *The People*, 101 Ill. 133,—to which latter case reference will be had hereafter—are in direct conflict with the views expressed by the same court in the Dennehy case, which cannot, therefore, affect the determination of this question by the federal courts. The settled doctrine of this court, as will be seen from the authorities above cited, is that when the state decisions are conflicting, this court will determine for itself what the law of the state is, irrespective of the decisions of the state courts.

To demonstrate further the distinction drawn by the legislature between the wholesale and the retail liquor business, the attention of the Court is again directed to Sec. 2 of the dram shop act, which provides that whoever shall, without a dram shop license, sell liquor in any quantity to be drunk upon his premises, shall be liable to fine or imprisonment. In consequence, if a wholesale dealer, having a wholesale dealer's license, sells a gallon of liquor which is consumed upon his premises, he will be liable to the same punishment as though he had no license whatever. The wholesale dealer's license will afford him no protection, as the law requires a dram shop license for such a sale. Moreover, assuming for a moment that the city of Chicago has power to license wholesale dealers, it can to-day pass an ordinance charging only five cents for a license without violating the state law or public policy. But to dram shop keepers it can grant no license for less than five hundred dollars without violating the letter, spirit and policy of the law. Can anything establish more clearly the distinction made by the legislature between the wholesaleand the retail business, or more forcibly demonstrate the legislative opinion as to the source from which the evils arising from the sale of liquor flow?

"In applying rules for interpreting statutes to questions of the effect of an enactment, we can never," says Vatell, "safely lose sight of its object. That must be the truest exposition of a law which best harmonizes with its design, its objects and its general structure."

Potter's Dwarris, 178.

"As regard must always be had to the subject matter, so, in construing a statute, we must never lose sight of its object and intent." Id. 202.

"All statutes in *pari materia* are to be read and construed together, as if they formed parts of the same statute and were enacted at the same time." Id. 145.

"As one part of a statute is properly called in to help the construction of another part, and is fitly so expounded as to support and give effect, if possible, to the whole, so is the comparison of one law with other laws made by the same legislature, or upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with a like advantage. In applying the maxims of interpretation, the object is throughout, first, to ascertain by legitimate means, and next to carry into effect the intentions of the framer. It is to be inferred, that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is therefore an established rule of law, that all acts in *pari materia* are to be taken together, as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view." Id. 189.

"Where acts are in *pari materia*, if the same word be used in both statutes, a distinction made in the one is a legislative exposition of the sense in which it is to be understood in the other." Id 191.

It has been suggested that if, as contended here by defendant in error, clause 46 was designed to cover the retail traffic, there was no occasion to pass any further laws on the subject, and the dram shop act would therefore be superfluous. But that is a misapprehension of the scope of both laws. The two laws are essential parts of one systematic whole. The first, clause 46, provides for the regulation by cities of the liquor traffic, subject to such laws as the state would thereafter enact; and the state thereafter enacted, by the dram shop act, how such regulation was to be conducted; that licenses were not to be granted by cities to dram shops for less than five hundred dollars, under any circumstances. The first law contemplates the passage of the second; the second has direct reference to the first. Can there be any doubt but these two acts have reference to the same subject and are directed to the same end? If the city of Chicago passes an ordinance requiring dram shop keepers to take out a license, does it not operate under clause 46? Again, if the city would pass an ordinance requiring dram shop keepers to pay four hundred dollars for a license, would it not violate the dram shop act, which forbids the issuance of a license by municipalities for less than five hundred dollars? Thus, the intimate relation between these two acts appears.

"In the construction of a statute, the courts will look out of it to other statutes in *pari materia*, or statutes of a similar import, which may be regarded as one system in which the construction of any separate act may be aided by the examination of other provisions which compose the system."

U. S. v. *Collin*, 3 Blatch. 325.

"It is an established rule in the exposition of statutes that the intention of the law giver is to be deduced from a view of the whole and every part of a statute, taken and compared together. When the words of the statute are not explicit the intention is to be collected from the context—from the occasion and necessity of the law—from the mischief felt—and the object and remedy in view."

Potter's Dwarris, 194, note 13.

"The connection and train of the discourse is another source of interpretation. We ought to consider the discourse together, and in order perfectly to conceive of the sense of it, and to give to each expression not so much signification as it may receive in itself alone, as that it ought to have from the thread aud spirit of the discourse. The reason of the law or treaty, that is, the motive which led to the making of it, is one of the most certain means of establishing the true sense. * * * As soon as we certainly know the reason of him who speaks, we ought to interpret his words, and to apply them in a manner suitable to that reason alone."

Potter's Dwarris, 128, (quoting Vattell's rules).

"The true rule for the construction of statutes is to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law; and thus to ascertain the *true* meaning of the legislature, although the meaning so ascertained conflict with the literal sense of the words."

Town of Ryegate v. *Town of Wordsboro*, 30 Vt. 746.

Jackson v. *Collins*, 3 Cow. 89.

Brown v. *Wright*, 13 N. J. 240.

"Statutes are to receive such a construction as must evidently have been intended by the legislature; and to ascertain this, the court called upon to give the construction may look to the object in view; the remedy intended to be afforded; and to the mischief intended to be remedied."

Winslow v. *Kimball*, 25 Me. 493.
Sibley v. *Smith*, 2 Mich. 486.

"In the interpretation of a law, the motive of the law maker and the meaning and scope of the law may be sought for in contemporaneous history, in the discussion attendant on the progress of the legislation, and in subsequent legislation in the same or on cognate matters."

State v. *Nichols*, 30 La. Ann. part 2, 980.

In a former part of this brief it was asserted, and it is here repeated, that the Supreme Court of Illinois has construed clause 46 to extend only to sales of liquor at retail. This assertion is based upon the following evidence: A druggist was convicted of selling liquor without a license. The Supreme Court of Illinois construing the proviso in clause 46 in relation to druggists, under which the city may grant permits to druggists while prohibiting the sale of liquor by others, says: "Again, in the general incorporation law, relating to incorporated cities and villages, the municipal authorities are expressly given the power to grant permits authorizing druggists to sell intoxicating liquors by the retail."

Wright v. *The People*, 101 Ill. 133.

"To sell by the retail" is the language of the court as to the meaning of the proviso, although the word retail is not mentioned in the proviso. If, then, the proviso has reference to sales at retail, so also must the act containing the proviso have. "A proviso is a limitation or exception to the authority conferred."

Voorhees v. *Bank of U. S.*, 10 Pet. 471.

If, then, the proviso relates to sales by the retail, the authority conferred by the act relates to sales by the retail. In law and logic they must have reference to the same subject. The Supreme Court of Illinois itself, in the same case, adopts this construction. After employing the language already quoted, that court proceeds to say: "Now, if druggists did not fall within the general inhibition on this subject, what necessity would there have been for conferring the power of granting permits upon the municipal authorities? We can see none whatever."

Wright v. *People*, Id.

The proviso, says the court, excepted druggists from the inhibition of the statute, and thereby authorized them to sell by the retail. But for the proviso, druggists would fall within the inhibition, and could not sell liquor by the retail. The inhibition, therefore, applies to sales by the retail. This is the only meaning which can rationally be attached to the language of the court.

In the Dennehy case, the court explains that in the Wright case, the scope of clause 46—in relation to which the language quoted was used—was not a question in that case. Nevertheless it was fully considered, and the language quoted can scarcely be denominated mere dictum. Whether the question was directly involved or not, the court evidently took it for granted that the tacit, contemporaneous construction of clause 46 was the correct one, and that that clause, despite its broad language, had reference only to sales by the retail.

There are, in the various reports, innumerable cases analogous in principle to the case at bar, but there is only one involving a similar state of facts, and that one was decided according to the principle contended for by the defendant in error in this case.

The act of 1871, of New Jersey, conferred upon the city of Pemberton power to license inns and lager beer saloons. The general law of 1872 provided that it shall not be lawful to sell lager beer in less quantity than a quart without a license first had for that purpose from the judges of the court of common pleas of the county, or from the other authorities then having power by law to grant licenses. The city of Pemberton, under the power vested in it by the act of 1871, passed an ordinance prohibiting the sale of lager beer in any quantity. A conviction being had under the ordinance, upon appeal, the Supreme Court of New Jersey construed that act in *pari materia* with the general law, and declared the ordinance unauthorized and void. The court says: "Where, therefore, the special authority granted to the municipality is merely to license lager beer saloons, the inference from the general law is very decided that the special power is limited to the licensing to sell by less quantity than one quart."

State v. *Garon*, Vol. 11, Central Reporter, p. 346.

All the principles and circumstances upon which judicial opinions are based, lead to the same conclusion as to the construction of the statute now under examination. Clause 46 itself; the acts in *pari materia* with it; the acts concerning brewers and distillers in comparison with it; the nature of the evil requiring a remedy; the object had in view by the enactment of these laws; the general legislation of the state upon the subject; the construction of the legislature; the contemporaneous construction by the municipalities; and the language of the Supreme Court of Illinois itself in the Strauss and Wright cases, all lead with irresistible force to the conclusion that this statute was designed to extend only to the sale of liquor at retail. No marvel, then, that Mr. Justice Craig, of the Illinois Supreme Court, dissenting from the majority opinion in the Dennehy case, places himself upon record as follows:

"Mr. Justice CRAIG: I am not satisfied with the construction placed upon the act of the legislature under which the ordinance was passed. I do not think the legislature intended to authorize the city to impose a license upon wholesale dealers."

Dennehy v. *The City of Chicago*, 120 Ill. 647.

IV.

The ordinance is void because the statute confers, at most, a mere police power, and does not authorize the city to make the power thus granted a source of revenue.

Assuming, for the present purpose of the argument, that clause 46 was designed by the legislature to embrace the sale of liquor at wholesale, defendant in error submits that the ordinance in question is void, because the city transcended its power. Clause 46 was intended to be a mere police power, and not a means of raising revenue. There is a recognized distinction to be found in the authorities between the power to license and the power to tax. There is a further distinction between the exercise of either power by a state and its exercise by a city.

"The grant of a license may be made by the state directly or through one of the municipal corporations of the state. Of the indirect grant, it is to be observed, that a municipal corporation as such has no inherent power to grant licenses or exact license fees. It must derive all its authority in this regard from the state, and the power must come by direct grant and cannot be taken by implication. * * The terms in which a municipality is empowered to grant licenses will be expected to indicate with sufficient precision whether the grant is conferred for the purpose of revenue, or whether on the other hand it is given for regulation merely. * * All delegated powers to tax ought to be closely scanned and strictly construed. * * When a power to license is given the intendment must be that regulation is the object, unless there is something in the language of the grant or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated. When the grant is not made for revenue, the fee should not exceed the expense of issuing the license and of regulating the business."

Cooley on Tax, 579.

"The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable in the case of taxes levied on occupations; and the authorities concur in holding that if it is not manifest that there has been a purpose by the legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal." Id. 574. "Where the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for license may still be exacted; but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or the probable expense of issuing the license and of inspecting and regulating the business which it covers. If the state intended to give broader authority, it is a reasonable inference that it will do so in unequivocal terms." Id. 411.

Burroughs on Tax, Sec. 393.

"Charters not unfrequently confer upon the corporations the power 'to license, regulate and tax' certain avocations and employments. * * Concerning useful trades and employments, a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases the former, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation, with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged. * * Sec. 292. In harmony with the foregoing principles, it has been held that under authori y 'to license and regulate' draymen, etc., a municipal corporation may, by ordinance, require a license to be first taken out and charge a reasonable sum for issuing the same and keeping the necessary record, but cannot, by virtue of this authority, without more, levy a tax upon the occupation itself; and, under the power to regulate, it may make proper police regulations, and prescribe the mode in which the employment shall be exercised."

Dillon on Mun. Cor., 292.

These questions have been considered by the highest courts of nearly every state in the Union, and the rules now firmly established are these: Where power to license, regulate and prohibit is conferred upon a city, it will not embrace the power to tax; that "the legislature knows how to give a regulating power of taxing as well as how to give a regulating power of licensing, and, if they intend both powers, it is strange that they should mention only one;" that the authority to exercise such power must affirmatively appear in the charter, and is never to be taken by implication; and that, where the power granted to cities does not in terms express the power to tax, the city is limited in its charge for a license to the actual expense entailed in issuing it.

Freeholder v. *Barber*, 2 Halst. 64.
City of St. Paul v. *Traeger*, 25 Minn. 248.
City v. *Fowler*, 32 Minn. 365.
Laundry License Case, 22 Fed. Rep. 701.
Mayor v. *Second Ave. R. R.*, 32 N. Y. 269.
Dunham v. *Trustees*, 5 Cow. 462.
Kip v. *Patterson*, 2 Dutch. 298.
State v. *Hoboken*, 33 N. J. 280.
City v. *Baumgardner*, 42 Ia. 673.

Delcamber v. *Clear*, 34 La. Ann. 1050.
Mays v. *Cincinnati*, 10 St. 268.
Commonwealth v. *Stonder*, 2 Cush. 571.

The Supreme Court of Illinois has slightly modified this rule. That court holds that revenue may be derived under the power to license and prohibit, and even without the power to license, under the power to regulate and prohibit. But the court does not depart from the rule that the question whether or not power to raise revenue is conferred under the power to license or regulate depends upon the intention of the legislature. Its doctrine is, that when the legislative intention in that regard is manifest, it matters little what words are employed by the legislature to express that intention. In Illinois, therefore, either the power to license or to regulate, coupled with the power to prohibit, may embrace authority to raise revenue, and may not. It depends upon the intention of the legislature.

Certainly, the legislature may, if it sees fit, confer power to license without authorizing cities to make that power a source of revenue; and it cannot be held necessary for the legislature, entertaining such an intention, to declare expressly that no power to raise revenue is intended to be granted by this act.

Defendant in error admits, therefore, that, under the Illinois decisions, the power conferred under clause 46 is broad enough to authorize the collection of revenue by the city, if the legislature intended to grant such power; in other words, that the language is sufficiently broad for that purpose. But this fact by no means impairs the rule laid down by Judge Cooley that the presumption is against the revenue power, "unless there is something in the language of the grant or in the circumstances under which it is made, indicating, with sufficient certainty, that the raising of revenue by means thereof was contemplated."

Is there such language, or are there such circumstances, in clause 46? Standing alone and thus construed, the answer is, yes. The language of clause 46 is: "And to determine the amount to be paid for such license." But, while the language appears to confer an unlimited discretion as to the amount of the license fee, when construed, as it should be, with reference to the entire law of which it forms a part, this language must be interpreted to confer merely power to determine the amount of the fee subject to the legal principle that it shall not exceed the cost of issuing the license and regulating the business. The act is designed to confer upon cities power to determine what police regulations are necessary to enact those regulations, and to compel liquor dealers to reimburse them the amount expended.

The act of which clause 46 is a part is a specific enumeration of the powers granted to the municipalities of the state. In a law of such importance it is not presumable that the legislature would leave in doubt that which the insertion of a single word would render certain. Nor did it in this instance. In every particular it manifested its intention in this regard by the use of clear and unequivocal terms. Whenever it intended to confer power to raise revenue it conferred not only power to regulate, license and prohibit, but, in addition thereto, power to tax.

In chapter 24, of which clause 46 is a part, are the following powers conferred upon municipalities:

"41. To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements.

42. To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.

43. To license, regulate, tax and restrain runners for stages, cars, public houses, or other things or places.

44. To license, regulate, tax or prohibit and suppress billiard, bagatelle, pigeon hole, or any other tables or implements kept or used for a similar purpose in any place of public resort, pin alleys and ball alleys.

46. To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed and fermented liquors.

91. To tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers and brokers.

95. To tax, license and regulate second-hand and junk stores."

From these sections the Court will observe that the legislature, in every instance in which it desired to confer power to tax, bestowed that power in express terms. Clause 41, for example, includes all the powers contained in clause 46, powers to license, regulate and prohibit. Yet the legislature, desiring to confer the further power to raise revenue from peddlers and hawkers, confers in addition the express power to tax. If the other powers, namely, the powers to license, regulate and prohibit, were broad enough to authorize the collection of revenue, then the power to tax would be superfluous; and "the legislature is not to be presumed as ever doing an unnecessary and useless act."

Wright v. *The People*, 101 Ill. 132.
Potter's Dwarris, 110.

It follows, as an unavoidable conclusion, that the legislature did not deem the powers to license, regulate and prohibit sufficiently broad to authorize the collection of revenue in clause 41, and if not in clause 41, what broader significance have they in 46? The two clauses are part of the same act, passed at the same time by the same body, with its attention directed to the particular subject and the distinction existing. The Court will observe further the significant fact that clause 46 is the only one enjoying immunity in regard to taxation. It is the only clause in the entire act in which the powers to license, regulate and prohibit are granted and the power to tax is withheld. The rule in such cases is open to neither doubt nor question. "When, in several statutes in *pari materia*, the legislature is sometimes found inserting and sometimes omitting a clause of relation, it is to be presumed that their attention has been drawn to the point, and that the omission is designed."

Potter's Dwarris, 198.

The Supreme Court of Missouri was called upon to construe an ordinance attempting to tax insurance companies, under a grant of power from the state to license such companies. This power was granted as one of many powers, some of which contained the words to tax, while others did not. The court, declaring the ordinance to be unauthorized and void, says: "The words to license may imply a power to tax when such is the manifest intention; but taken disconnected and alone they will not generally confer that authority. The intention may be readily gathered by referring to the powers given to the cities in the section we are now considering. It is only by enumerated powers and grants authority is given to the mayor and city council to legislate upon the general police of the city. In the 18th subdivision it confers authority 'to license, *tax* and regulate auctioneers and grocers,' etc. The 19th gives the power 'to license, tax and regulate horse railroad cars, hackney coaches,' etc. The 21st: 'To license, tax, regulate and suppress theatricals and other exhibitions, shows and amusements.' The 22d: 'To license, *tax*, restrain, prohibit and suppress billiard tables,' etc. But in the 45th, the power is simply 'to license insurance companies.'"

City of St. Louis v. *Boatmen's Trust Co.*, 47 Mo. 154.

City v. *Laughlin*, 49 Mo. 559.

The Supreme Court of Minnesota, in a case fully considered and involving the exact principle here contended for, passed upon an ordinance. The state of Minnesota gave its municipalities power to establish public markets, under which power the city attempted to impose license fees. The court, in the course of a lengthy and able opinion, says: "If, as in this case, the charter confers, in general terms, upon the common council authority to pass ordinances for certain designated general purposes connected with the good order and government of the municipality, which is followed by a provision in the same section containing the grant, declaring in terms that such ordinance, etc., "shall have the force of law. * * * And that, for such purposes, said council shall have authority by ordinance, resolutions or by-laws, to do, ordain and enact various enumerated things in the way of municipal control, regulation, restraint, granting license, etc., embracing, as in this instance, forty-one distinct specifications, thereby showing that the legislative mind was fully directed to the different matters concerning which municipal authority was intended to be given, it is but reasonable to conclude that the exact scope and extent of municipal powers and authority conferred must be found in the subsequent enumerations rather than in the general grant itself. The latter is restricted and limited by the former. * * * That the power to license, regulate and restrain the particular business aimed at in the ordinance in question is not covered by this subdivision of Sec. 3, is made further apparent by reference to other specifically enumerated powers therein contained. We find there given express authority to license and regulate various kinds of business and employments, including "butcher-shops and butcher stalls, and vendors of butchers' meat;" * * * If the power "to establish public markets" included the authority to license, regulate and prohibit any kind of business away from the locality of the market, it certainly covered that of vending fresh meats, and yet it was deemed necessary to confer it in express terms in that matter, thereby excluding the inference that any such authority could be exercised under the provision in relation to markets."

City v. *Traeger*, 25 Minn. 252.

The Missouri case, above cited, is not only perfectly analogous to the case at bar, but is rendered especially authoritative here, by reason of the fact that the doctrine of the Missouri court is the same adopted by the Illinois court. Like the latter, it holds that the power to license may include the power to tax, where the intention of the legislature to confer such power appears.

There is another part of this Illinois law which demonstrates conclusively that the legislature did not, by the grant of the power "to determine the amount to be paid for such license," intend to confer power to raise revenue, and that its sole object, in the use of such language, was to render the police power vested in cities less restricted, and, in consequence, more effectual.

By clause 4 of the same act, cities are empowered "to fix the amount, terms and manner of issuing and revoking licenses." Notwithstanding this power, however, whenever the legislature designed to bestow power to raise revenue, it conferred express power to tax, thus proving that no such power was conferred by the authority to fix the amount and terms of issuing licenses. Here is a construction of this language from a guiding source, the interpretation of a thought by the mind that conceived it.

It may be said that no reason can be seen why the legislature should give cities authority to raise revenue from bankers, brokers, peddlers and others engaged in like occupations, and exempt liquor dealers from this liability. A conclusive answer is that the legislature did nothing of the kind. But, while it granted all power which it designed to grant over other matters in the one act, the subject of liquor is left open to further consideration; and, resuming consideration of the matter, proceeded to enact that licenses shall not be granted by cities to dram shop keepers for less than five hundred dollars. Here is an act evincing a legislative intention to vest power to raise revenue; and here, under the Illinois doctrine, the power to raise revenue would be upheld, although the power to tax is not granted in words. And this is the burden, which, in the opinion of the legislature, the liquor traffic should bear.

The defendant in error submits that clause 46 confers only a police power; that it does not authorize the city of Chicago to employ it as a means of revenue; that there is no other power. even claimed by any one, conferred over wholesale liquor dealers, even if clause 46 has, as construed by the Illinois Supreme Court, reference to that subject; that the ordinance in question does convert it to a means of revenue, for it can scarcely be claimed that the expense incurred by the regulation of the wholesale liquor business (if there is any such regulation) can by any possibility be two hundred and fifty dollars yearly. No evidence is required to disprove such an assumption. Courts exercise their judgment in such cases, without proof, as did the United States Court in the Laundry License Cases, in the 22d Federal Reporter.

While, as a matter of law, it would seem clear that this ordinance is invalid, the creation of a mere doubt as to its validity is as fatal to its existence as is an absolute demonstration. The Court is not now called upon to pass upon the validity of a state statute, upheld by every presumption of law, for the validity of the statute is not doubted. No doubt as to the power of the legislature is raised. The Supreme Court of Illinois, in the Dennehy case, states that in *Timm* v. *Harrison*, 109 Ill. 609, it decided that, the constitution vesting in the legislature power to tax liquor dealers, the legislature could proceed to classify the dealers and impose taxes accordingly. No one doubts this. Not only can the legislature do this, but it can also empower cities to do it. But the question here is not what power the legislature has, but what power it exercised. There is some distinction between an act and the mere power to act. A man has power to kill another; yet that power, latent and unexercised, will never lead to his execution.

The question presented here is as to the validity of a city ordinance, having no presumption of validity at its foundation. "Any fair, reasonable doubt concerning the existence of power is resolved against the corporation and the power denied."

Dillon on Mun. Cor., Sec. 89.

Cooley on Tax, 277.

"In the construction of a charter, to be in doubt is so resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all courts in this country and in England. No other has received the sanction of any authority to which we owe much deference. This court has asserted it times without number. * * Let it be remembered, that nothing but plain English words will do it."

Pa. R. R. Co. v. *Can. Coms.*, 21 Pa. St. 22.

Plaintiff in error, borrowing this idea from the Supreme Court of Illinois, states that, while it is true that there is no precedent in the Illinois decisions for the Dennehy case, yet, in the cases arising from the retail liquor business, there is nothing to show that the result would have been any different if sales in large quantities would have been involved. Quite true. There is nothing to indicate that the result would have been either different, or similar, if the wholesale liquor business had been concerned. The same remark applies with equal force to wheat, cattle, bonds and real estate. There is nothing in the cases to show what would have been the result if any of these subjects had been involved. It is not usual for courts, after deciding a question involved, to proceed with an enumeration of questions which they do not decide and which are not involved; otherwise, every opinion would be an encyclopædia of useful and valuable information.

Plaintiff in error, in his brief, indulges in various speculations to account for defendant in error's lack of a license, and finally concludes that he is an improper person to receive a license; else, he argues, he would not assume the risk to sell without a license, and thus render his contracts void. This conclusion cannot beget universal approval. The result proves, not that defendant in error is an improper person to sell, but that plaintiff in error is an improper person to whom to sell. A perusal of this brief will probably satisfy the curiosity of plaintiff in error as to defendant's reason for taking out no license.

The reason is that he had every right and ~~jurisdiction~~ justificat to believe that the ordinance was enacted without any authority of law whatever; that no such burden had ever before been imposed upon him, and no new law had recently been passed; that there was nothing in the law to show that the legislature had changed its liberal policy towards men in his line of business, a policy adhered to by it since the organization of the state and proclaimed by its Supreme Court; that the only construction which the statute here involved had ever received by the Supreme Court of Illinois favored his view; that he could not, at the time of making the sale, have anticipated that the Supreme Court of Illinois would thereafter render an opinion changing its former view, nor that, if it would, it would have any legal effect upon his contract; and, finally, he was not bound to presume that the purchase was made by plaintiff in error for the sole purpose to defraud him, if circumstances would render an attempt practicable. All these reasons are based upon facts appearing in the record and conclusions necessarily drawn from them.

Plaintiff in error contends that, as the decision in the Dennehy case could not be reversed by this Court through a direct appeal, it ought not be reversed in an indirect proceeding. This being a local law and involving no federal question, it is difficult to see how any decision rendered in this suit could operate as a reversal of that case. But even were such result a logical consequence, the force of the objection is not apparent. Defendant in error ought not to be divested of his legal rights merely because their determination may involve a review of a state decision.

If the decision of the Supreme Court of Illinois in the Dennehy case were binding upon this court, argument in behalf of defendant in error would be useless, for the case must be decided against him upon every point. If that court is right in holding that the wholesale liquor traffic has been placed by the legislature of Illinois upon a legal and moral level with the retail business, that it is productive of the same evils and subject to the same burdens and remedies, a contract made in violation of such a law is void. Furthermore, if that decision were binding as to the validity of the ordinance, to argue or to reason could be of no avail.

The defendant in error submits that, under established rules, he is entitled to the independent judgment of this Court upon his rights in the premises. The decision of the Supreme Court of Illinois, while entitled to great respect as a construction of a local law, can scarcely afford conclusive authority, in view of the opposition offered alike by reason and principle, and in further view of the fact that its views upon all essential points in the Dennehy case are denied, refuted and contradicted by Courts whose opinions are entitled as well to the highest consideration. On the other hand, the court will look in vain for a single decision rendered by any court of the United States, which can be claimed to be a precedent for the Dennehy case. With due respect to that court it must be stated that its decision in that case was a new departure. No effort is made by the court to demonstrate why the principles governing the construction of laws *in pari materia* do not apply in that case. No attempt is made to explain the remarkable and capricious acts imputed to the legislature. It is not shown why the legislature, designing to grant a certain power, mentioned it specifically in every other instance, and in this one failed to do so. Some of these questions do not appear to have been considered. The court, as appears from the opinion, failed to consider clause 46 as affected by the other clauses of the same act. The court did not for one moment take into consideration the general policy and legislation of the state upon the subject. As to these vital features, the opinion can be read and re-read without deriving therefrom an idea or impression. Upon what principle of law, justice or propriety can it be contended that if a state court commits an error, the Supreme Court of the United States is under an obligation to adopt that error as its own? A most singular proposition it is, thus stated, and this is in effect the position of plaintiff in error. To the merits of the questions arising in this case, and to the opinion in the Dennehy case, so far only as it arises in this case and is based upon reasoning which this Court can approve, the attention of Their Honors is respectfully invited.

Respectfully submitted,

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CHICAGO, DEC. 28th, 1888.